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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JOSEPH A. WAMBAUGH,
Petitioner,

v.

JAY C. SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI APPENDIX

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Filed June 26, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 95-7533, 95-7534

JAY C. SMITH
v.
JOHN J. HOLTZ, Bureau of Technical Services, Pennsylvania; RONALD F. COLYER, Bureau of Technical Services, Pennsylvania State Police; VICTOR DOVE; JOHN J. PURCELL, Special Agent In Charge, Central Regional Office, Bureau of Criminal Investigations, Office of the Attorney General; WILLIAM J. LANDER, Bureau of Criminal Investigations, Office of the Attorney General; PAUL YATRON,
Appellants in No. 95-7533

JAY C. SMITH
v.
JOSEPH P. WAMBAUGH,
Appellant in No. 95-7534

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civil Action Nos. 93-cv-01428 and 94-cv-01470)

Argued May 3, 1996

BEFORE: STAPLETON, COWEN and SEITZ, *Circuit Judges*

(Opinion Filed June 26, 1996)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

In *Heck v. Humphrey*, 114 S. Ct. 2364 (1994), the Supreme Court held that 42 U.S.C. § 1983 does not provide a cause of action to recover monetary compensation for an allegedly unconstitutional conviction or imprisonment where recovery would necessarily imply the invalidity of an outstanding criminal conviction of a state court. In these consolidated civil rights actions, Jay Smith seeks monetary compensation for his allegedly unconstitutional conviction and imprisonment on murder charges. On direct appeal from Smith's murder conviction, the Supreme Court of Pennsylvania reversed that conviction due to a state-law evidentiary error and remanded for a new trial. Before the retrial, however, that court ordered the dismissal of all charges against Smith based on newly discovered evidence of prosecutorial misconduct. In these ensuing civil rights cases, the defendants unsuccessfully sought dismissal of Smith's claims on statute of limitations grounds, arguing that they accrued when his conviction was reversed, even though he was still the subject of an ongoing prosecution at that time. Since Smith's claims were filed more than two years after that reversal but within two years of the dismissal of all charges against him, we must decide whether, under the teachings of *Heck*, a claim is cognizable under § 1983 where its success would necessarily imply the invalidity of a future conviction that might be entered on a pending criminal charge. We hold that such a claim is not cognizable under § 1983. It necessarily follows that claims like those of Smith do not accrue so long as the potential for a judgment in the pending criminal prosecution continues to exist. Since this potential existed in Smith's case until the Pennsylvania Supreme Court ordered the charges dismissed on September 18, 1992, Smith's claims did not accrue before that date. Accordingly, Smith's claims were timely filed and we will affirm.

I.

In April 1986, a jury convicted Smith of the murders of Susan Reinert and her children. Smith immediately appealed. While the appeal was ongoing in July 1988, the government disclosed that police investigators had withheld potentially exculpatory evidence.[1] On

[1] The evidence in question is five rubber "lifters." These lifters are tools that were used to remove physical evidence from Reinert's body. Smith defended the charges against him on

December 22, 1989, on direct appeal the Supreme Court of Pennsylvania reversed Smith's convictions on the unrelated ground that the Court of Common Pleas had improperly admitted hearsay evidence. *Commonwealth v. Smith*, 568 A.2d 600 (Pa. 1989). The Pennsylvania Supreme Court remanded for a new trial.

Smith remained in prison pending a second trial. He promptly moved to dismiss the ongoing prosecution on double jeopardy grounds, arguing that the withholding of exculpatory evidence at the first trial amounted to prosecutorial misconduct. Smith had not previously raised this issue because he had not learned of the misconduct until after his trial and because the supporting evidence was not part of the record on direct appeal. On September 18, 1992, the Pennsylvania Supreme Court ordered all charges dismissed based on the double jeopardy clause of the Pennsylvania Constitution. *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992). The court held that Pennsylvania's double jeopardy clause prevented retrial because the withholding of evidence was "intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." *Id.* at 325. Smith was immediately released.

On September 15, 1993, Smith filed a § 1983 claim against John Holtz, Ronald Colyer, Victor Dove, John Purcell, William Lander, and Paul Yatron (the "*Holtz* case"). Holtz, Colyer, Dove, Purcell, and Lander were government officials involved in the investigation. Yatron was an attorney with the Pennsylvania Attorney General's office. Smith alleged that the misconduct in connection with the concealing of the exculpatory evidence violated his Fifth, Sixth, and Fourteenth Amendment rights. On September 14, 1994, Smith filed a separate § 1983 suit against Joseph Wambaugh (the "*Wambaugh* case"). He claimed that Wambaugh, an author, had conspired with police investigators to conceal exculpatory evidence and to fabricate evidence linking Smith to the murders, in order to make money from a book and a television mini-series. He alleged violations of his Fourth, Sixth, and Fourteenth Amendment rights. In both cases he sought to recover the damages resulting from his unlawful conviction and confinement.

The defendants in both cases argued that Smith's claims were time-barred by the applicable two-year Pennsylvania statute of limitations because they accrued when his conviction was reversed in 1989.[2] Based

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the theory that William Bradfield had committed the murders at the New Jersey shore. On cross examination, a former police officer who was present at the autopsy explained that he had removed sand from between Reinert's toes with rubber lifters. The prosecution did not produce or disclose the existence of these lifters at trial.

[2] In § 1983 cases, federal courts apply the state personal injury statute of limitations, *Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985), which in this case is two years, *Smith v.*

on *Heck v. Humphrey*, 114 S. Ct. 2364 (1994), the district court concluded that Smith's § 1983 claims were timely filed because they did not accrue until the Pennsylvania Supreme Court ordered all charges dismissed in 1992. We consolidated the interlocutory appeals filed by all defendants under 28 U.S.C. § 1292(b).[3]

II.

The outcome of this appeal turns on *Heck v. Humphrey*, 114 S. Ct. 2364 (1994). Heck was convicted of voluntary manslaughter in a state court. While his direct appeal was pending, he filed a § 1983 suit against two prosecutors and a government investigator. He sought monetary damages resulting from his allegedly unlawful conviction. The district court dismissed the case and the Seventh Circuit Court of Appeals affirmed. Before the case reached the Supreme Court, the state supreme court denied relief in Heck's direct appeal of his criminal conviction, the district court denied Heck's habeas petition, and the Seventh Circuit affirmed that denial. *Id.* at 2368.

The Supreme Court granted *certiorari* to decide whether under § 1983 a state prisoner could pursue money damages premised on an allegedly unlawful outstanding conviction. The Court began its analysis by noting that since § 1983 creates a species of tort liability, the common law of torts "provide[s] the appropriate starting point for the inquiry." *Id.* at 2370. The Court observed that the common law tort of malicious prosecution was analogous to Smith's claim because a malicious prosecution claim allows a plaintiff to recover for unlawful imprisonment pursuant to legal process. A necessary element of a malicious prosecution claim is the termination of the criminal proceedings in favor of the accused:

City of Pittsburgh, 764 F.2d 188, 194 (3d Cir.), *cert. denied*, 474 U.S. 950 (1985); 42 Pa. Cons. Stat. Ann. § 5524.

[3] In the *Holtz* case, the district court first granted the defendants summary judgment three days after the Supreme Court announced its decision in *Heck*. Smith filed a timely appeal. After it learned of *Heck*, the district court granted a Federal Rule of Civil Procedure 60(b) motion filed by Smith, reconsidered its order, and denied summary judgment based on *Heck*. The *Holtz* defendants argue that *Heck* should not apply to this case because the district court abused its discretion in reconsidering its original grant of summary judgment in their favor. Because the Supreme Court decided *Heck* while the *Holtz* case was still pending, *Heck* applies to the *Holtz* case regardless of whether the district court abused its discretion in granting Smith's Rule 60(b) motion. *C & K Coal Co. v. United Mine Workers of America*, 704 F.2d 690, 698 (3d Cir. 1983) ([A]ppellate courts are obliged to apply the law as they find it at the time of their judgment.") Since we do not understand the *Holtz* defendants to argue that Rule 60(b) relief was improper even if *Heck* applies to this case, we express no opinion on that issue.

> This requirement "avoids parallel litigation over the issue of probable cause and guilt . . . and it precludes the possibility of the claimant [sic] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." Furthermore, "to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit."

Id. at 2371 (alterations in original) (citations omitted).

For these reasons the Court held that "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damage actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement." *Id.* at 2372. Accordingly, "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* A claim seeking such damages is not cognizable under § 1983 even though such claim is within the literal terms of § 1983. *Id.*

Accordingly, a "district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* If not, the action should be allowed to proceed:

> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, which, we hold

> today, does not encompass the "injury" of being convicted and imprisoned (until his conviction has been overturned).

Id. at 2372-73 n.7 (citations omitted).

Since Heck's claims challenged the legality of his conviction and his conviction remained in effect, the Court dismissed Heck's claims as not cognizable under § 1983. *Id.* at 2374.

Smith asserts in his complaints that the defendants suppressed exculpatory evidence and contrived inculpatory evidence. His claims seek damages resulting from his unlawful conviction and confinement. If he had brought these claims before September 18, 1992, when the Pennsylvania Supreme Court ordered the charges against him dismissed, success on these claims would have necessarily implied the invalidity of any future conviction on the still pending criminal charges.

Heck did not directly address claims that, if successful, would necessarily imply the invalidity of a potential conviction on a pending criminal charge. In certain portions of the opinion, the Court spoke in terms of claims that, if successful, imply the invalidity of "outstanding" convictions. Other portions of the opinion, however, refer to claims that, if successful, imply the invalidity of convictions without specifying whether this includes claims that, if successful, would imply the invalidity of potential convictions that may result from pending charges.

The Supreme Court did not address this issue because it was not presented by the facts in *Heck*. The Court had before it the § 1983 claim of a plaintiff who was serving a sentence on an outstanding conviction. The Court thus had no occasion to determine the scope of permissible § 1983 claims by a defendant in an ongoing criminal prosecution. Accordingly, we must look to the reasoning behind the *Heck* rule to determine whether a claim that, if successful, would necessarily imply the invalidity of a conviction on pending criminal charges is cognizable under § 1983.

The Supreme Court observed that the problem presented by Heck's case is that it lay "at the intersection" of the Civil Rights Act of 1871 and the federal habeas corpus statute. *Heck*, 114 S. Ct. at 2369. Some accommodation was required because the federal habeas statute has an express exhaustion requirement that precludes the filing of a federal habeas petition holding the potential for interference with determinations made in state criminal proceedings, while § 1983 requires no exhaustion of state remedies. *Id.* The Court accommodated these two statutes by holding that § 1983 actions are subject to the "hoary principle" that civil tort actions are not the appropriate vehicle for challenging the validity of convictions and sentences. The express objectives of this holding were to

preserve consistency and finality, and to prevent "a collateral attack on [a] conviction through the vehicle of a civil suit." *Id.* at 2371.

We find that these concerns apply equally to claims that, if successful, would necessarily imply the invalidity of a future conviction on a pending criminal charge. A claim by a defendant in an ongoing criminal prosecution which necessarily challenges the legality of a future conviction on a pending criminal charge lies at the intersection of the federal habeas corpus statute and the Civil Rights Act of 1871. If such a claim could proceed while criminal proceedings are ongoing, there would be a potential for inconsistent determinations in the civil and criminal cases and the criminal defendant would be able to collaterally attack the prosecution in a civil suit. In terms of the conflicts which *Heck* sought to avoid, there is no difference between a conviction which is *outstanding* at the time the civil rights action is instituted and a *potential* conviction on a pending charge that may be entered at some point thereafter.

Because of these concerns, we hold that a claim that, if successful, would necessarily imply the invalidity of a conviction on a pending criminal charge is not cognizable under § 1983. *See Hamilton v. Lyons*, 74 F.3d 99 (5th Cir. 1996) (interpreting *Heck* to prevent accrual of § 1983 claims that would necessarily imply the invalidity of convictions on pending criminal charges). It necessarily follows that so long as success on such a claim would necessarily imply the invalidity of a conviction in the pending criminal prosecution, such a claim does not accrue so long as the potential for a judgment in the pending criminal prosecution continues to exist.[4] This did not occur in Smith's case until the Pennsylvania Supreme Court ordered the charges dismissed on September 18, 1992. Smith's claims thus did not accrue before that date and, since he filed those claims within two years thereafter, they are not time barred.

III.

Wambaugh argues, in the alternative, that if Smith's claims did not accrue before the 1992 dismissals, they have yet to accrue. The contention is that a judicial finding of actual innocence is a prerequisite for a common law malicious prosecution claim and, accordingly, is a prerequisite here. Since the double jeopardy ruling of the Pennsylvania Supreme Court was not premised on a finding of Smith's actual innocence, the argument goes, he has not satisfied that prerequisite. We are unpersuaded.

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[4] Our holding is consistent with the common law of malicious prosecution to which the Supreme Court looked in *Heck*. According to the common law of malicious prosecution, a defendant in an ongoing criminal prosecution cannot bring a malicious prosecution claim. *See Restatement of the Law of Torts* §§ 658, 659 (1938).

First, Wambaugh misstates the common law of malicious prosecution. Actual innocence is not required for a common law favorable termination, *see Restatement of the Law of Torts* §§ 659, 660 (1938), and a dismissal of charges on double jeopardy grounds is a common law favorable termination. *E.g., Haefner v. Burkey*, 626 A.2d 519, 521 (Pa. 1993).

But, more importantly, Wambaugh misreads *Heck*. While the *Heck* court looked to the common law for guidance, it did so solely for the purpose of accommodating the congressional intent reflected in the civil rights and habeas corpus statutes. As a result, *Heck* should not be read to incorporate all of the common law of malicious prosecution into the federal law governing civil rights cases of this kind. *Heck* represents a limitation on the availability of relief for constitutional torts that extends no further than the congressional concerns which justify it. As we have explained, those concerns dictate that a district court decline to entertain a civil rights claim asking monetary compensation for an allegedly unlawful conviction or imprisonment where success on that claim would necessarily imply the invalidity of an outstanding conviction or a potential conviction in a pending criminal proceeding. When that outstanding conviction or that pending criminal proceeding ceases to exist, however, the justification for barring access to the federal courts likewise ceases. This means, among other things, that the rationale of *Heck* will not support a requirement that a civil rights plaintiff like Smith must have judicially established his innocence before invoking § 1983.

IV.

For the foregoing reasons, we will affirm.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed May 15, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAY C. SMITH,	:	
Plaintiff	:	NO. 1:CV-94-1470
v.	:	JUDGE McCLURE
JOSEPH P. WAMBAUGH,	:	
Defendant	:	

MEMORANDUM
May 15, 1995

BACKGROUND

Plaintiff Jay C. Smith filed this section 1983 action[1] alleging the violation of his civil rights by defendant Joseph Wambaugh in connection with Smith's April, 1986 murder conviction. Plaintiff was convicted of murdering Philadelphia school teacher Susan Reinert and her two minor children, Michael and Karen Reinert, and was sentenced to death for those crimes. *Commonwealth v. Pennsylvania v. Jay C. Smith*, Crim. Nos. 1677, 1677(A) and 1677(B) (Dauphin Co.). Reinert's body was discovered in the trunk of her car parked in a hotel parking lot near Harrisburg, Pennsylvania on June 25, 1979. The bodies of her children were never found.

Smith's conviction was reversed on direct appeal to the Pennsylvania Supreme Court, *Commonwealth v. Smith*, 568 A.2d 600 (Pa. 1987), on evidentiary grounds unrelated to the alleged concealment of the rubber lifters[2] and his case remanded to the Dauphin County Court of Common Pleas for a new trial.[3]

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[1] 42 U.S.C. § 1983.

[2] During Smith's trial, his counsel cross-examined a prosecution witness on the existence of physical evidence found during the autopsy of Reinert's body which supported his theory that the murders had taken place at the New Jersey shore. During cross-examination, prosecution witness John C. Balshy, a former state policeman who had been present during the autopsy, testified that he had observed a grainy substance--which appeared to be sand--between Reinert's toes. Balshy further testified that he had preserved this evidence by pressing it into rubber "lifters." (Plaintiff's complaint, ¶¶ 20-21). The "lifters" were not produced at trial, and their actual existence was never confirmed by the prosecution during, or at any time prior to, Smith's 1986 trial.

Smith defended the charges against him by contending that Reinert and her children had been murdered at the New Jersey shore by William Bradfield and/or associates of his and that those individuals had then conspired to make it appear that Smith was responsible for the murders. Bradfield had been previously convicted of murdering the three victims.

The case was never retried. In 1988, Smith learned that the lifters about which Balshy testified did in fact exist and that their existence had been concealed from him by the prosecution. He moved, on that basis, for dismissal of all charges against him.

Smith's motion for dismissal, filed February 1, 1990, was denied by the Dauphin County Court of Common Pleas. The Pennsylvania Superior Court affirmed the denial on appeal, *Commonwealth v. Smith*, 591 A.2d 730 (Pa. Super Ct. 1991). The Pennsylvania Supreme Court reversed on September 18, 1992, *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), and, based on its finding that the Commonwealth had deliberately suppressed the existence of two adhesive lifters, which supported plaintiff's claim of innocence, ordered plaintiff's discharge from custody. The Pennsylvania Supreme Court held that, due to the prosecutorial misconduct which led to plaintiff's conviction, no further charges could be pursued against Smith for the Reinert murders and that a

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For a more complete history of the underlying state criminal action, see the court's memorandum filed on March 24, 1995 in the companion civil rights action filed by Smith against the state investigators responsible for investigating the Reinert murders, *Smith v. Holtz*, Civ. No. 93-1428 (M.D.Pa.).

[3] On appeal to the Pennsylvania Supreme Court, Smith raised nineteen grounds for reversal of his conviction, including an assertion that the evidence adduced at trial was insufficient as a matter of law to establish his guilt of all elements of the crimes charged. That assertion was rejected by the Pennsylvania Supreme Court. *Smith, supra*, 568 A.2d at 602.

The Supreme Court considered on the merits only one of the nineteen grounds for reversal alleged by Smith--his contention that out-of-court statements allegedly made by co-conspirator Bradfield to his colleagues and others implicating Smith in the Reinert murders constituted inadmissible hearsay. The Supreme Court agreed that admission of the statements constituted reversible error and remanded the case for a new trial on that ground. *Id.* at 607-610.

Although the defense learned of the prosecution's alleged concealment of the lifters prior to disposition of Smith's appeal by the Pennsylvania Supreme Court and brought the matter to the court's attention, the court did not consider that issue on the merits, preferring instead to have the matter considered in the first instance by the trial court:

On January 19, 1989, this Court ordered the Court of Common Pleas of Dauphin County to conduct an evidentiary hearing regarding certain evidence in the Commonwealth's possession, which may have been exculpatory in nature, but which was never disclosed to the defense. The evidence in question was a 'rubber lifter,' an evidence collection device, which allegedly contained grains of sand found on Mrs. Reinert's feet during the autopsy. Appellant argued that this evidence was significant to his defense in that it would have supported his theory that Mrs. Reinart was killed at the seashore by Bradfield and his associates.

In view of our disposition, we need not consider this issue in determining whether a new trial should be granted. This evidence will now be available at a subsequent trial, and the jury will be given the opportunity to assess its import within the totality of the evidence presented.

Smith, supra, 568 A.2d at 610 n. 8.

retrial would violate his right against double jeopardy under the Pennsylvania Constitution.

Plaintiff filed this action on September 14, 1994 against author Joseph P. Wambaugh. Smith alleges that Wambaugh conspired with the Pennsylvania State Police Troopers[4] assigned to investigate the Reinert murders to conceal exculpatory evidence, namely the lifters, and to fabricate evidence linking Smith to the murders. Plaintiff names as Wambaugh's alleged co-conspirators: Pennsylvania State Police Trooper Victor Dove; Pennsylvania State Police Trooper Joseph Van Nort; Pennsylvania State Police Trooper John (Jack) J. Holtz and Pennsylvania Deputy Attorney General Richard L. Guida, Esq. None of these individuals is named as defendant in this action. Wambaugh is the sole defendant.

Smith alleges that initially Holtz and Van Nort were the primary investigators assigned to investigate the Reinert murder. The murder occurred in July, 1979. Smith alleges that in correspondence dated January 29, 1981, Wambaugh promised to pay Van Nort "an additional $45,000.00. This [case] is current and hot which is why I'm offering you this kind of money." (Plaintiff's complaint, ¶ 50). In the sentences just prior to these statements, Wambaugh refers to an alleged agreement between the two to provide information on the Reinert case, stating: "During this period of time you would reveal to me everything you know about the case and supply me with any documents which might help me." (Plaintiff's complaint, ¶ 50).

In correspondence dated June 19, 1981, Van Nort allegedly tells Wambaugh: "Things are going well, here, but slow. I will keep in touch with you." (Plaintiff's complaint, ¶ 51).

Eventually, Smith alleges, other investigators and a prosecutor assigned to the case were brought into the circle and participated in the conspiracy to deprive Smith of his constitutional right to exculpatory evidence and to fabricate evidence implicating him in the murders. (See: plaintiff's complaint, ¶¶ 68-69)

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[4] In a companion action filed before this court, *Smith v. Holtz*, Civ. No. 93-1428 (M.D.Pa.) on September 15, 1993, Smith asserts section 1983 claims against the state investigators responsible for reviewing and preserving the evidence against him: John J. Holtz and Ronald F. Colyer, both of the Bureau of Technical Services of the Pennsylvania State Police; Victor Dove, John J. Purcell and William J. Lander of the Central Regional Office of the Bureau of Criminal Investigation of the Office of the Pennsylvania Attorney General; and Paul Yatron, Executive Director of the Attorney General's office in Harrisburg, Pennsylvania.

That case, filed a year prior to the filing of this case, is not time-barred.

Smith alleges that during his 1986 trial for the Reinert murders, Trooper Dove found the rubber lifters with the sand taken from Susan Reinert's feet, which supported the defense theory that Reinert and her children were murdered at the New Jersey Shore by other individuals. Smith alleges that four business days before the trial ended, Trooper Dove came upon the lifters in a police evidence locker but made no attempt to reveal their existence to the defense and, moreover, took steps to ensure that they would not come to light. These alleged efforts were apparently effective, Smith alleges, since the existence of the lifters did not come to light until years later, while his criminal conviction for the murders was on direct appeal to the Pennsylvania Supreme Court. Discovery of the lifters and of the prosecution's apparent involvement in concealing their existence from defendant and his counsel led ultimately to the dismissal of all charges against Smith under a Pennsylvania Supreme Court order of discharge barring his retrial on the ground that it would violate the Pennsylvania Constitution's prohibition against double jeopardy. The Supreme Court's ruling of discharge was based on the prosecutorial misconduct in concealing the existence of the lifters.

Smith alleges that the police investigators and a deputy attorney general assigned to the investigation conspired to conceal the lifters and falsify evidence linking him to the murders because they had a mutual pecuniary interest in the success of Wambaugh's book on the murders and in a possible television mini-series based on the book. This led them, Smith alleges, to take steps to increase the likelihood that he would be convicted of the Reinert murders.

Smith asserts three claims against Wambaugh: 1) a section 1983 claim, 42 U.S.C. § 1983, based on Smith's alleged participation in a conspiracy to violate his Fourth, Sixth and Fourteenth Amendment rights (Count I); 2) a state tort claim for civil conspiracy and abuse of process based on alleged acts of evidence tampering for the purpose of altering the course and outcome of plaintiff's criminal trial for the "pecuniary" and "self-aggrandizing interests" of the alleged co-conspirators (Count II); and 3) a state tort claim for abuse of process based on defendant's alleged suborning of evidence tampering (Count III).

Defendant has filed a Rule 12(b)(6) motion to dismiss all claims as time-barred and for failure to state a cause of action on the ground that plaintiff cannot establish termination of the underlying criminal action in his favor, an element essential to his section 1983 claim. For the reasons which follow, defendant's motion will be granted in part. Plaintiff's state tort claims will be dismissed with prejudice as time-barred. Plaintiff's section 1983 claim survives.

DISCUSSION

Rule 12(b)(6) motion

In deciding defendants' motion, we are "required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). "In determining whether a claim should be dismissed under Rule 12(b)(6)," we look "only to the facts alleged in the complaint and its attachments without reference to other parts of the record." *Id.* Dismissal is not appropriate unless "it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiff's allegations." *Id.*

Timeliness of section 1983 claim

Defendant moves to dismiss all claims as time-barred. Federal courts apply the state personal injury statute of limitations in section 1983 actions, *Wilson v. Garcia*, 471 U.S. 261, 276-80, (1985). Under the Pennsylvania statute of limitations applicable here, the time limit for filing a section 1983 claim is two years. *Smith v. City of Pittsburgh*, 764 F.2d 188, 194 (3d Cir. 1985), *cert. denied*, 474 U.S. 950 (1985) and 42 Pa. Cons. Stat. Ann. § 5524.

When the cause of action accrues on a section 1983 claim is a question of federal law. *Albright v. Oliver*, 127 L.Ed.2d 114, 128 n. 6 (1994) (Ginsburg, J. concurring). In general, a section 1983 claim accrues when the facts which support the claim are, or should be, apparent to a person with a reasonably prudent regard for his rights and when the identity of the person or persons responsible for the alleged violation is known or reasonably should have been known to the plaintiff. *McMillian v. Johnson*, Civ. No. 93-A-669-N, slip op. 15 (M.D.Alabama Jan. 17, 1995) (1995 WESTLAW 21963), citing *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987).

Under the facts alleged here, that occurred on September 18, 1992, the date of plaintiff's discharge from state custody. This action was filed on September 14, 1994, within two years after Smith's discharge by the Pennsylvania Supreme Court pursuant to its order dated September 18, 1992. Under this court's interpretation of the United States Supreme Court's ruling in *Heck v. Humphrey*, 129 L.Ed.2d 383 (1994),[5] plaintiff's section 1983 cause of action accrued on the date of discharge.

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[5] See the memorandum filed by this court on March 24, 1995 in the companion case, *Smith v. Holtz*, for a more thorough analysis of the *Heck* decision and its impact on plaintiff's section 1983 claims.

The Court's analysis in that case led this court to conclude that the cause of action for the deprivation of a fair trial recognized in *Heck, supra*, does not ripen until the underlying conviction is reversed, expunged, vacated, or otherwise rendered a nullity. *Id.* at 394. See generally: *Snyder v. City of Alexandria*, 870 F.Supp. 672 (E.D.Va.1994); *Hudson v. Chicago Police Department*, 860 F.Supp. 521, 523 (N.D.Ill. 1994); and *McMillian v. Johnson*, Civ. No. 93-A-699-N, slip op. at 15 (M.D.Ala. Jan. 17, 1995) (1995 WESTLAW 21963).

Although plaintiff's claim is not asserted against a state actor, it is plainly governed by the Court's ruling in *Heck*. Plaintiff alleges that the Pennsylvania State Police Troopers assigned to investigate the murders conspired with Wambaugh to conceal the rubber lifters which would have supported plaintiff's claim of innocence and also conspired to fabricate inculpatory evidence by encouraging a prosecution witness to change his story. (Plaintiff's complaint, ¶ 46) He can establish his claim that Wambaugh conspired with state actors to deprive him of his federal constitutional right to a fair trial only by attacking the validity of his underlying conviction and the state process used to obtain that conviction.

Heck therefore plainly applies to the civil rights conspiracy claim alleged here. Its application renders plaintiff's filing timely.

Asserted inability to prove favorable termination of underlying action

Defendant also seeks dismissal of plaintiff's civil rights claim on the ground that plaintiff cannot establish termination of the underlying criminal action in his favor as is required by federal law. For the reasons stated in the memorandum filed by this court on March 24, 1995 in the companion action, *Smith v. Holtz*, we reject defendant's argument on this issue.

State tort claims

Plaintiff alleges a state tort claim for civil conspiracy and for abuse of process based on alleged acts of evidence tampering and a state tort claim for abuse of process based on defendant's alleged suborning of evidence tampering.[6] (Plaintiff's complaint, Counts II and III, respectively) Plaintiff alleges that Wambaugh and his alleged co-conspirators "perversely, coercively and/or improperly used the criminal process for a purpose not intended by law; namely to fulfill their pecuniary and/or otherwise self-aggrandizing interests by the evidence tampering means aforesaid." (Plaintiff's complaint, ¶ 84)

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[6] Supplemental jurisdiction exists pursuant to 28 U.S.C. § 1367.

To determine when plaintiff's cause of action accrued on the state claims asserted here, it is helpful first to review the underpinnings and elements of plaintiff's state law claims.

Abuse of process is defined by the *Restatement (Second) of Torts*, § 682 as follows:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

Cited in *ATX Telecommunications Services v. U.S. Wats*, Civ. A. No. 92-3328, (E.D.Pa. Feb. 5, 1993) (1993 WL 30076), (applying Pennsylvania law). In the comment to section 682, the Restatement explains further:

> a. The gravemen of the misconduct for which the liability stated in this Section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish . . . The subsequent misuse of the process, though properly obtained, constitutes misconduct for which the liability is imposed under the rule stated in this Section.
>
> . . . . [Illustrations omitted.]
>
> b. "Primarily." The significance of this word is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant. Thus the entirely justified prosecution of another on a criminal charge, does not become abuse of process merely because the instigator dislikes the accused and enjoys doing him harm; nor does the instigation of justified bankruptcy proceedings become abuse of process merely because the instigator hopes to derive benefit from the closing down of the business of a competitor.
>
> For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.

An action for abuse of process differs from an action for malicious prosecution in several key respects.

> The gist of an action for abuse of process is the improper use of process after it has been issued, that is, a perversion of it . . . 'An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it. . . On the other hand, legal process, civil or criminal, may be maliciously used so as to give rise to a cause of action where no object is contemplated . . . other than its proper effect and execution.'
>
> Malicious use of civil process has to do with the wrongful initiation of such process, while abuse of civil process is concerned with a perversion of a process after it is issued.
>
> An action for malicious prosecution is statutorily based, *see* 42 Pa.C.S.A. § 8351, while malicious abuse of process is a common law action.

Rosen v. Tesoro Petroleum Corporation, 582 A.2d 27, 32 (Pa. Super. Ct. 1990) (Internal citations omitted.)

It is "the use of the legal process as a tactical weapon to coerce a desired result that is not the legitimate object of the process." *McGee v. Feege*, 535 A.2d 1020, 1026 (Pa. 1987). Once a process is issued, the focus is then on the purpose for which it is used. *Jennings v. Shuman*, 567 F.2d 1213, 1218 (3d Cir.1977) (discussing state law in determining parameters of section 1983 action for abuse of process). This purpose can be either legitimate or illegitimate, and if it is found to be illegitimate, an abuse of process occurs. *Id.* at 1219. The presence or absence of probable cause is irrelevant to a claim for abuse of process. *Id.* at 1217.

Further, unlike malicious prosecution, a claim for abuse of process does not require the plaintiff to prove that the underlying action terminated in his favor. *Brown v. Johnston,* 675 F.Supp. 287, 290-91 (W.D.Pa. 1987). Nor does it require the plaintiff to demonstrate lack of probable cause for initiating the underlying proceedings. *Junod v. Bader*, 458 A.2d 251, 253 (Pa. Super. Ct. 1983) See also: *Davis v. Cheltenham Township Police Department*, 767 F.Supp. 104, 106 (E.D.Pa. 1991).

Both state law claims asserted by Smith are governed by Pennsylvania's two-year statute of limitations. *Harvey v. Pincus*, 549 F.Supp. 332, 342 (E.D.Pa. 1982), citing *Jennings v. Shuman* . . .] 567 F.2d 1213, 1217-18 (3d Cir. 1977) and 42 Pa. Cons. Stat. Ann. § 5524. The cause of action for these claims "accrues when the process is used for an improper purpose." *Harvey*, 549 F.Supp. at 342.

Precisely when that occurred in this case would be impossible for this court to determine at this stage of the case. While it is obvious that the initial issuance of process against Smith occurred well outside the two-year limitations period, his claim against Wambaugh stems not from that act, but from some act thereafter at the point when Wambaugh allegedly began conspiring with the state investigators to conceal or fabricate evidence to assure a conviction--it was at that point that the "process" was allegedly diverted from its legitimate purpose to, at least in part, the illegitimate one of obtaining Smith's conviction for financial gain regardless of guilt or innocence. Precisely when that occurred cannot be determined at this stage of the case. What is clear, however, from the facts alleged, is that this alleged diversion of the process occurred well beyond the two-year limitations period. Smith was tried in 1986. Any alleged fabrication of evidence had to take place prior to the conclusion of the trial. There would be no point in conspiring to fabricate evidence *after* he was convicted.

The alleged fabrication of evidence is, however, only one aspect of Smith's claims. He also claims here, as he did in the companion action filed against the state police assigned to investigate the Reinert murders, that exculpatory evidence discovered during his trial was concealed from him and his attorney. The existence of the exculpatory evidence did, however, come to light in 1988, again well before the two-year limitations period governing the filing of this action.

Thus, by 1988, only one element remained to give Smith the basis for the asserted state claims against Wambaugh: some basis for suspecting that Wambaugh was involved in an alleged plot to conceal exculpatory evidence or to pervert the criminal prosecution to a purpose other than effecting justice and convicting the individual or individuals responsible for the deaths of Susan Reinert and her children.

That proof came, according to Wambaugh's complaint, in March, 1992 when an individual identified in the complaint only as the "junkman" allegedly discovered in the basement and attic of Trooper Holtz' residence a box of items containing evidence from the Smith trial and notes incriminating the alleged co-conspirators in an alleged plot to convict Smith for their own financial gain and turned those items over to "plaintiff's by-then-former counsel" (an individual not identified by name in the complaint) and someone, whether plaintiff's counsel or some other individual is not indicated, caused an article to be published in the Sunday edition of the "Patriot-News," a Harrisburg, Pennsylvania newspaper. The items allegedly discovered at the Holtz residence included "unspecified correspondence between defendant [Wambaugh] and Trooper Holtz." (Plaintiff's complaint, ¶ 46) Although the correspondence is referred to in

paragraph 46 of plaintiff's complaint as unspecified, the introduction to that paragraph states that such correspondence was "[a]mong the items located in. . . [the] box that were turned over to plaintiff's former counsel," leaving no doubt that correspondence allegedly linking Wambaugh to the alleged concealment and fabrication of evidence was in the hands of plaintiff's counsel no later than March 17, 1992.

With the publication of that article, all of the elements which plaintiff needed to assert a cause of action against Wambaugh for abuse of process or conspiracy to commit abuse of process existed. He had before him at that point facts suggesting Wambaugh's involvement in a conspiracy to subvert his criminal prosecution for an improper purpose.

Although he had not yet been released from state custody or had his conviction invalidated, neither was a prerequisite for maintaining a claim for abuse of process. See e.g., *Brown*, 675 F.Supp. at 290-91. Cf. *Heck* (By analogy to the state tort claim for malicious prosecution, the Supreme Court held that establishing invalidation of the underlying conviction is a prerequisite for maintaining a section 1983 claim challenging the constitutionality of that conviction).

Plaintiff's state tort claims asserted in Counts II and III of the complaint are, therefore, time-barred, and defendants' motion to dismiss those counts will be granted on that basis.

s/ James F. McClure, Jr.
United States District Judge

Filed March 24, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAY C. SMITH,	:	
Plaintiff	:	NO. 4: CV - 93-1428
v.	:	(McClure)
JOHN J. HOLTZ, et al.,	:	
Defendants	:	

MEMORANDUM
March 24, 1995

BACKGROUND

Plaintiff Jay C. Smith filed this section 1983 action[1] alleging the violation of his civil rights by defendants in connection with his April, 1986 murder conviction. Plaintiff was convicted of murdering Philadelphia school teacher Susan Reinert and her two children, Michael and Karen Reinert, and was sentenced to death for those crimes. *Commonwealth v. Pennsylvania v. Jay C. Smith*, Crim. Nos. 1677, 1677(A) and 1677(B) (Dauphin Co.). Reinert's body was discovered in Dauphin County on June 25, 1979. The bodies of her children were never found.

Smith defended the charges against him by contending that Reinert and her children had been murdered at the New Jersey shore by William Bradfield and/or his associates of his and that those individuals had then conspired to make it appear that Smith was responsible for the murders. Bradfield had been previously convicted of murdering the three victims.

During Smith's trial, his counsel cross-examined a prosecution witness on the existence of physical evidence found during the autopsy of Reinert's body which supported his theory that the murders had taken place at the New Jersey shore. During cross-examination, prosecution witness John C. Balshy, a former state policeman who had been present during the autopsy, testified that he had observed a grainy substance--which appeared to be sand--between Reinert's toes. Balshy further testified that he had preserved this evidence by pressing it onto rubber "lifters." (Plaintiff's complaint, ¶¶ 20-21). The "lifters" were not produced at trial, and their actual existence was never confirmed by the prosecution during, or at any time prior to, Smith's 1986 trial.

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[1] 42 U.S.C. § 1983.

Smith's conviction was reversed on direct appeal to the Pennsylvania Supreme Court, *Commonwealth v. Smith*, 568 A.2d 600 (Pa. 1987), on evidentiary grounds unrelated to the alleged concealment of the lifters and his case remanded to the Dauphin County Court of Common Pleas for a new trial.[2]

The case was never retried. In 1988, Smith learned that the lifters about which Balshy testified did in fact exist and that their existence had been concealed from him by the prosecution. He moved, on that basis for dismissal of all charges against him.

Smith's motion for dismissal, filed February 1, 1990, was denied by the Dauphin County Court of Common Pleas. The Pennsylvania Superior Court affirmed the denial on appeal, *Commonwealth v. Smith*, 591 A.2d 730 (Pa. Super. Ct. 1991). The Pennsylvania Supreme Court reversed on September 18, 1992, *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992), and, based on its finding that the Commonwealth had deliberately suppressed the existence of the two adhesive lifters, ordered plaintiff's discharge from custody. The Pennsylvania Supreme Court held that, due to the prosecutorial misconduct which led to plaintiff's conviction, no further charges could be pursued against Smith for the

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[2] On appeal to the Pennsylvania Supreme Court, Smith raised nineteen grounds for reversal of his conviction, including an assertion that the evidence adduced at trial was insufficient as a matter of law to establish the guilt of all elements of the crimes charged. That assertion was rejected by the Pennsylvania Supreme Court. *Smith, supra*, 568 A.2d at 602.

The Supreme Court considered on the merits only one of the nineteen grounds for reversal alleged by Smith--his contention that out-of-court statements allegedly made by co-conspirator Bradfield to his colleagues and others implicating Smith in the Reinert murders constituted inadmissible hearsay. The Supreme Court agreed that admission of the statements constituted reversible error and remanded the case for a new trial on that ground. *Id.* 607-610.

Although the defense learned of the prosecution's alleged concealment of the lifters prior to disposition of Smith's appeal by the Pennsylvania Supreme Court and brought the matter to the court's attention, the court did not consider that issue on the merits, preferring instead to have the matter considered in the first instance by the trial court:

On January 19, 1989, this Court ordered the Court of Common Pleas of Dauphin County to conduct an evidentiary hearing regarding certain evidence in the Commonwealth's possession, which may have been exculpatory in nature, but which was never disclosed to the defense. The evidence in question was a 'rubber lifter,' an evidence collection device, which allegedly contained grains of sand found on Mrs. Reinert's feet during the autopsy. Appellant argued that this evidence was significant to his defense in that it would have supported his theory that Mrs. Reinert was killed at the seashore by Bradfield and his associates.

In view of our disposition, we need not consider this issue in determining whether a new trial should be granted. This evidence will now be available at a subsequent trial, and the jury will be given the opportunity to assess its import within the totality of the evidence presented.

Smith, supra, 568 A.2d at 610 n. 8.

Reinert murders and that a retrial would violate his right against double jeopardy under the Pennsylvania Constitution.

Plaintiff filed this action on September 15, 1993 against the state investigators responsible for reviewing and preserving the evidence against him: John J. Holtz and Ronald F. Colyer, both of the Bureau of Technical Services of the Pennsylvania State Police; Victor Dove, John J. Purcell and William J. Lander of the Central Regional Office of the Bureau of Criminal Investigation of the Office of the Pennsylvania Attorney General; and Paul Yatron, Executive Director of the Attorney General's office in Harrisburg, Pennsylvania. (Plaintiff's complaint, ¶¶ 10-16).

Smith alleges that defendants knowingly and deliberately concealed from him and from his attorney, William Costopoulos, Esq., exculpatory evidence which would have bolstered his claims of innocence in violation of his right to receive from the prosecution exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1962).[3] Plaintiff also asserts the non-disclosure to be a violation of the Rules of Professional Conduct for Attorneys, Rule 3.8. (Plaintiff's complaint, ¶ 38). Smith alleges that the defendants knowingly and intentionally concealed evidence critical to his defense with the intention and effect of denying him a fair trial. (Plaintiff's complaint, ¶¶ 23-29 and 34-35).

Plaintiff alleges that the defendants acted out of a desire to: 1) "avoid public embarrassment of the state police and the office of the attorney general because of the conduct of their investigation;" 2) "avoid confirmation of plaintiff's allegations of prosecutorial misconduct in his post-conviction petitions; and to 'cover up' a persistent, consistent pattern of misconduct and incompetence throughout the investigation of the Reinert murders;" and 3) on the part of defendant Holtz, to receive compensation for his story on the investigation. (Plaintiff's complaint, ¶ 36).

On the basis of the foregoing, plaintiff alleges a cause of action under section 1983 based on the violation of his Fifth, Sixth and Fourteenth Amendment rights. He alleges that he has been deprived of the right to: a) freedom from the deprivation of life, liberty or property without due process of law; b) a fair trial in a criminal prosecution, and the right to be free of malicious prosecution; and c) the right to equal

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[3] The failure to disclose exculpatory evidence is a violation of a criminal defendant's constitutional rights. *Snyder v. City of Alexandria*, 870 F.Supp. 672, 689 (E.D.Va. 1994), citing *Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989) ("Being subjected to a prosecution because an officer withheld exculpatory evidence from the prosecutor while urging that the prosecution should go forward can work a constitutional deprivation."), *cert. denied*, 494 U.S. 1081 (1990).

protection of the laws. (Plaintiff's complaint, ¶ 40). As redress for these alleged violations, plaintiff seeks compensatory and punitive damages and attorney's fees pursuant to section 1988.

Defendants moved for partial summary judgment[4] on plaintiff's due process and equal protection claims on the ground that there are no material facts in dispute on those claims and that defendants are entitled to judgment on them as a matter of law.

In an order and memorandum dated June 27, 1994, this court granted defendants' motion and entered judgment in defendants' favor on all claims asserted. The basis for the court's ruling was twofold. The court found that plaintiff's malicious prosecution claim was barred under the United States Supreme Court decision in *Albright v. Oliver*, 127 L.Ed.2d 114 (1994) (Rehnquist, C.J., plurality opin.), which abrogated the right to proceed on a malicious prosecution claim under the Due Process Clause of the Fourteenth Amendment. The court further found that all section 1983 claims asserted under the Fifth, Sixth and Fourteenth Amendments were barred by the statute of limitations, since plaintiff initiated this action more than two years after learning of the prosecution's alleged concealment of the lifters. Plaintiff appealed that ruling to the United States Court of Appeals for the Third Circuit.

Three days prior to this court's grant of defendants' motion, the United States Supreme Court ruled in *Heck v. Humphrey*, 129 L.Ed.2d 383 (1994), that a civil rights plaintiff cannot maintain a cause of action arising out of a state criminal charge, unless and until he can demonstrate that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 394. The Supreme Court's ruling in *Heck, supra*, plainly undercuts the rationale for this court's ruling that plaintiff's section 1983 claims are time-barred.

On the basis of *Heck, supra*, this court certified to the Third Circuit that: "if a Rule 60(b) motion were filed by the plaintiff, the motion would be granted" and the court would "grant reconsideration on the statute of limitations question, grant counsel an opportunity to brief the applicability of *Heck, supra*, to the issue presented here, and unless arguments of the defendants persuade us otherwise, reverse the grant of summary judgment entered in favor of the defendants on plaintiff's section 1983 claim for the denial of a fair trial."

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[4] Record document no. 7.

Plaintiff then filed a Rule 60(b) motion[5] asking for relief from the court's entry of judgment against him. Plaintiff also moved for a remand from the Third Circuit. The latter motion was granted, and the matter remanded from the Third Circuit to this court.

Plaintiff's Rule 60 motion has been fully briefed. For the reasons stated herein, the court will grant the motion and vacate the judgment entered June 27, 1994 on plaintiff's Sixth and Fourteenth Amendment claims. However, no basis exists to vacate entry of judgment on plaintiff's Fifth Amendment or Fourteenth Amendment malicious prosecution claim, and the court's ruling on those claims stands. No further discussion is needed on this ruling.

DISCUSSION

Standard of review

Plaintiff moves for reconsideration under Fed. R. Civ. P. 60(b). Rule 60(b) confers authority on a district court to relieve a party from a final judgment "[o]n motion and upon such terms as are just" on the basis of any "reason justifying relief from the operation of the judgment." Fed.R.Civ.P. 60(b)(6).

Although the "law is well established that Rule 60(b)(6) affords relief from a final judgment only under extraordinary circumstances," *High v. Zant*, 916 F.2d 1507, 1509 (11th Cir. 1990), *cert. denied*, 489 U.S. 954 (1991), it is equally "well settled that the matter is within the sound discretion of the district court." *Id. Scott v. Singletary*, Civ. No. 83-8293, slip op. at 2 (S.D.Fla. Nov. 17, 1994) (1994 WL 669882).

A supervening clarification of controlling law by a higher court can afford a sufficient basis for granting a Rule 60(b) motion. See: *Adams v. Merrill, Lynch, Pierce, Fenner & Bowen*, 888 F.2d 696 (10th Cir. 1989) and *Cox v. Wyrick*, 873 F.2d 200 (8th Cir. 1989); *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir.), *cert. denied*, 483 U.S. 1010 (1987); and *Scott, supra*. The following factors are relevant in determining whether grant of a Rule 60(b) motion is appropriate based on change in controlling law: 1) whether the change in the law is final and definitive; 2) whether the judgment has been executed; 3) whether the Rule 60(b)(6) motion was filed soon after the judgment was rendered; 4) whether the intervening decision is closely related to the instant case; and 5) considerations of comity (the "Rule 60(b)(6) factors"). *Scott, supra*, slip op. at 2, citing *High, supra*, 916 F.2d at 1509 and *Ritter, supra*, 811 F.2d at 1401-03.

One justification for allowing a Rule 60(b) request for relief is to afford the district court an opportunity to correct plain errors and avoid the

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[5] Record document no. 24.

needless delay and expense incurred by all concerned if the movant's sole remedy was appeal to a higher court. See: *Scott*, *supra*.

Rule 60(b)(6) considerations

The Supreme Court's decision, issued three days prior to our grant of defendants' motion, plainly justifies granting relief from the judgment under the relevant Rule 60(b)(6) considerations. *Heck*, *supra*, represents a "final and definitive" clarification of federal constitutional law issued by the nation's highest court. Plaintiff filed a timely appeal to the United States Court of Appeals for the Third Circuit and an equally timely Rule 60(b)(6) motion upon learning of the holding in *Heck*, *supra*. The Court's holding in *Heck*, *supra* is directly on point and is not distinguishable on any basis from the facts and issues presented here. Finally, grant of plaintiff's motion is consistent, not inconsistent, with considerations of comity--it affords him an opportunity to pursue a civil action for monetary damages for prosecutorial misconduct acknowledged by the Pennsylvania Supreme Court. See: *Scott*, *supra*, slip op. at 2.

Heck v. Humphrey

The United States Supreme Court's ruling in *Heck*, *supra*, changes this court's prior analysis of the timeliness of plaintiff's claims. In *Heck*, *supra*, the Supreme Court ruled that the cause of action on a civil rights claim arising out of a state criminal charge does not arise until the plaintiff's conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 394.

Federal courts apply the state personal injury statute of limitations in section 1983 actions, *Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985). Under the Pennsylvania statute of limitations applicable here, the time limit for filing a section 1983 claim is two years. *Smith v. City of Pittsburgh*, 764 F.2d 188, 194 (3d Cir. 1985), *cert. denied*, 474 U.S. 950 (1985) and 42 Pa. Cons. Stat. Ann. § 5524.

Accrual date

When the cause of action accrues on a section 1983 claim is a question of federal law. *Albright v. Oliver*, 127 L.Ed.2d 114, 128 n. 6 (1994) (Ginsburg, J. concurring). In general, a section 1983 claim accrues when the facts which support the claim are, or should be, apparent to a person with a reasonably prudent regard for his rights and when the identity of the person or persons responsible for the alleged violation is known or reasonably should have been known to the plaintiff. *McMillian v. Johnson*, Civ No. 93-A-699-N, slip op. (M.D.Alabama Jan. 17, 1995) (1995 WESTLAW 21963), citing *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987).

Heck, supra, did not expressly indicate when the cause of action accrues on a claim for the denial of a fair trial. The Court's inclusion of the requirement that the underlying conviction be expunged, overturned, or otherwise invalidated makes it impossible for the claim to accrue prior to that act. It is only upon the moment of invalidation[6] that this element necessary to establish the claim comes into existence.

That impression is reinforced by the cases decided subsequent to *Heck, supra.* In all such cases, the federal courts have held the accrual date to be no earlier than the date of invalidation.

That was the ruling of the United States District Court for the Middle District of Alabama in *McMillian v. Johnson,* Civ. No. 93-A-699-N, slip op. at 15 (M.D.Alabama Jan. 17, 1995) (1995 WESTLAW 21963). Walter McMillian was prosecuted and convicted of the murder of Ronda Morrison on November 1, 1986 before the Court of Common Pleas of Monroe County, Alabama. McMillian was arrested on charges of first degree murder on June 7, 1987 and convicted by a jury in September, 1988.

Subsequent developments indicated that state and county officials conspired to fabricate inculpatory evidence against McMillian and to conceal from him evidence supporting his claims of innocence. McMillian's conviction was reversed in February, 1993 by the Alabama Court of Criminal Appeals, based on its finding that the prosecution had failed to disclose exculpatory evidence. In March, 1993, the State of Alabama dismissed all charges against McMillian. McMillian was released from custody after serving six years on death row.

Following his release, McMillian filed a section 1983 action in federal court against the Monroe County officials and Alabama state officials allegedly responsible for manufacturing evidence against him and concealing evidence supporting his claims of innocence.

Defendants argued, on a motion for summary judgment, that McMillian's section 1983 claims were time-barred, since McMillian had knowledge of defendants' alleged complicity in depriving him of a fair trial more than two years prior to commencement of the federal action. The district court rejected defendants' argument. It found that under *Heck, supra,* McMillian's section 1983 claim for his "allegedly unconstitutional conviction and imprisonment . . . did not become cognizable until his conviction and sentence were invalidated by the Alabama Court of Criminal Appeals in February 1993." *Id.* at 30. See also: *McMillian, supra,* slip op. at 52.

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[6] We use the term "invalidation" in a generic sense to cover all of the possible means of negating the underlying conviction recognized by the Court in *Heck, supra.*

The United States District Court for the Eastern District of Virginia reached the same conclusion in *Snyder v. City of Alexandria*, 870 F.Supp. 672 (E.D.Va.1994). Walter T. Snyder was convicted of rape and other related charges by a Virginia jury on June 25, 1986 and sentenced to forty-five years in prison. His conviction and sentence were upheld on direct appeal. After serving nearly seven years of his sentence, Snyder was pardoned by the Governor of Virginia on April 23, 1993, on the basis of newly performed DNA tests which provided conclusive proof that Snyder had not committed the rape.

Snyder filed a section 1983 action in federal court against the prosecuting officers in April, 1994, within one year after the date of his pardon. The defendants argued that his claims were time-barred because the alleged constitutional violations were committed more than two years prior to his commencement of the federal action. That argument was rejected out-of-hand by the district court. *Id.* at 678 and 685. Citing *Heck, supra*, the district court held that the cause of action for section 1983 claims challenging the manner in which a state reversal was obtained does not accrue until the conviction is invalidated by state or federal authorities. *Snyder, supra*, 870 F.Supp. at 685. On that basis, the district court held that the statute of limitations on Snyder's section 1983 claims for the defendants' alleged role in withholding exculpatory evidence, in improperly swaying the victim's identification of Snyder as her assailant, and in knowingly misrepresenting statements made by Snyder to the police as a confession, did not begin to run until his conviction was invalidated by the governor's pardon. *Id.* at 685.

The district court distinguished between section 1983 claims arising out of alleged Fourth Amendment violations relating to improper search and seizure operations, and those arising out of alleged prosecutorial misconduct in concealing, manufacturing or altering evidence, stating that the cause of action for the latter does not arise under *Heck, supra*, until the conviction has been invalidated. *Id.* at 687-88.

Requiring a section 1983 plaintiff to commence a federal action seeking damages for the denial of his federal constitutional right to a fair trial prior to the final resolution of all state criminal charges against him would run contrary to well established principles of comity and federalism. If such an action were commenced, the federal district court would, in most cases, be compelled to abstain from ruling and stay the action pending final disposition in state court. Any other result would create the possibility of a ruling in conflict with the outcome in state court. See generally: *Snyder, supra*, 870 F.Supp. at 681 n. 17 (The "favorable termination" requirement exists for the purpose of "avoiding conflict with

an ongoing criminal prosecution and ensuring that challenges to convictions are determined in an appropriate forum.")

That was the decision reached by the United States District Court for the Northern District of Illinois in *Hudson v. Chicago Police Department*, 860 F.Supp. 521, 523 (N.D.Ill.1994). Gregory W. Hudson filed a section 1983 action against the Chicago Police Department while awaiting trial in state court on double homicide charges. Hudson sought monetary damages for the alleged violation of his civil rights by the Chicago Police Department and the Chicago district attorney staff by conspiring to conceal from him exculpatory evidence. Although Hudson did not seek release from custody, the issues which he raised challenged his custody status, leading the court to consider his complaint as, in part, an application for habeas corpus relief.[7] That finding led the district court to conclude: "If this court allowed this complaint to proceed, a judgment in favor of Hudson would imply that the defendants withheld exculpatory evidence from Hudson and tampered with the evidence in all the myriad ways he recounts in his complaint, thus undermining any conviction that may be had in Hudson's trial." *Id.* at 523. On that basis, the court held that it was required to abstain from hearing the case and dismissed the complaint, holding open the possibility of relief at a later date under the Supreme Court's holding in *Heck*, *supra*, upon a showing of acquittal, reversal or expungement. *Id.* "Abstention is appropriate when a plaintiff invokes federal jurisdiction for the purpose of restraining state criminal proceedings." *Id.* at 524, citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) and *Younger v. Harris*, 401 U.S. 37 (1971). See also: *Snyder*, *supra*, 870 F.Supp. at 679 n. 10 ("The concern here is 'a matter of ripeness, a belief that the malicious prosecution action should not be tried at a time when it might tend to chill testimony in the criminal action, when issues may still be narrowed by the criminal process, and when the civil dispute might still be resolved by compromise or other non-judicial measures if the criminal trial can but proceed to an end.'"), quoting Prosser & Keeton, *Prosser and Keeton on the Law of Torts*, § 119, at 874 (5th ed. 1984).

For all of the reasons expressed above, we conclude that the cause of action for the concealment of or tampering with evidence recognized in *Heck*, *supra*, does not ripen until the underlying conviction is reversed, expunged, vacated, or otherwise rendered a nullity.[8] *Id.* at 394. Any

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[7] 28 U.S.C. § 2241.

[8] Compare: *McMillian*, *supra*, slip op. at 16 (plaintiff's claims challenging the constitutionality of his pre-trial detention on death row did not go to the lawfulness of his state criminal conviction and were, therefore, not governed by *Heck*, *supra*).

other result would contravene the Supreme Court's requirement that the plaintiff be required to demonstrate invalidation of the underlying conviction before proceeding with a federal constitutional claim based on the conduct of the prosecuting officers.

One aspect of this case renders it different from the prior cases cited. Smith obtained a reversal of his conviction from the Pennsylvania Supreme Court in 1989. However, the conviction was obtained, not on the grounds which form the basis of his section 1983 claim, i.e. the alleged concealment of evidence, but on the basis of the trial court's admission of inadmissible hearsay.[9] The case was remanded to the trial court for a new trial, although that never came to pass for other reasons.

The 1989 reversal obtained by Smith was not a final disposition of the underlying charges in Smith's favor. He remained incarcerated awaiting retrial for the Reinert murders. It was only with the issuance of the Pennsylvania Supreme Court's order of discharge that all threat of further prosecution ended and the state proceedings against him irrevocably came to an end. Therefore, although Smith had obtained a reversal of the underlying conviction more than two years prior to the filing of this complaint, the reversal was not a termination of the underlying matter in the sense intended by the Supreme Court's holding in *Heck, supra.* Finality was obtained only with the issuance of the Pennsylvania Supreme Court's order discharging him from state custody and barring his retrial.[10] Only upon the issuance of that order did Smith have the ability to establish all of the prerequisites necessary for filing this action. It was, therefore, on that date that his cause of action accrued.

The District Court for the District of Arizona reached the same conclusion without analysis in *Girdler v. Dale,* 859 F.Supp. 1279 (D.Ariz.1994). In that case plaintiff Ray Girdler filed a section 1983 action alleging that the deputy state fire marshals in charge of investigating the arson case against him "knowingly withheld exculpatory evidence . . . from the prosecutor, judge, and jury." *Id.* at 1280. Girdler was convicted of arson and two counts of murder in the spring of 1992 and sentenced to a term of incarceration of 21 years on the arson conviction and two 25-year terms for the murder convictions, all sentences to run consecutively. Girdler filed a petition for post-conviction relief in February, 1988, seeking a new trial on the basis of evidence not presented

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[9] See the discussion at note 2 *infra.*

[10] See, e.g., *Snyder, supra,* 870 F.Supp. at 681 (In resolving in plaintiff's favor the question of whether issuance of a pardon from the Virginia Governor satisfied the favorable termination requirement, the district court noted that: "Snyder's pardon substantially impugns and discredits his conviction, and therefore qualifies as a favorable termination of the prosecution against him.")

at his trial suggesting that the fires which gave rise to the charges against him were caused by a phenomenon known as flashover, and that this evidence was not presented at his original trial. His conviction was vacated on November 21, 1990. On December 18, 1991, all charges against him were dismissed.

On September 16, 1993 Girdler filed a section 1983 action in federal court against the deputy fire marshals alleging their violation of his constitutional rights under the Fifth and Fourteenth Amendments. Defendants moved for summary judgment on the ground that plaintiff's section 1983 claim was barred by the two-year Arizona statute of limitations applicable to such actions. The district court disagreed, holding that Girdler's claims accrued on December 18, 1991, the date when all charges against him were dismissed.

Smith's complaint was filed with this court on September 15, 1993, within two years of the Pennsylvania Supreme Court's ruling ordering his discharge from custody and barring any further prosecution against him for the Reinert murders. Plaintiff's Rule 60(b) motion will be granted on that basis.

We hold, therefore, that when an accused has been tried and convicted, his section 1983 action for deprivation of a fair trial due to the withholding of exculpatory evidence does not accrue before there has been both an invalidation of that conviction, *Heck*, *supra*, and a final termination of the criminal proceedings in favor of the accused.

In *Heck*, Justice Scalia stated at the conclusion of the opinion of the Court:

> Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor . . . so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.

Id., 129 L.Ed.2d at 396. In *Heck*, the court deemed the invalidation of a conviction or sentence to be the operative equivalent of a termination in the plaintiff's favor. However, the invalidation of a conviction does not always equate to a termination of the criminal proceedings in favor of an accused - it often results only in a remand for a new trial, as in the instant case. If the accused were then retried and convicted, there would, presumably, be no viable § 1983 cause of action, just as there would be no state malicious prosecution cause of action. So as not to interfere with the state process, consistent with habeas exhaustion principles as elaborated upon in *Heck*, there must be finality - a termination of the criminal proceedings. Furthermore, the termination must be "in favor of" the

accused, at least in the sense that the charges have been dismissed and the defendant discharged.[11] We therefore hold that there can be no civil action under § 1983 for denial of due process during trial for withholding exculpatory evidence unless and until the charges have been dismissed and the defendant discharged.

We hold further, that in the context of this case, "termination in favor of the accused" does not require a showing of innocence of the underlying crime.

Here, Smith's allegations go to the alleged denial of a fair trial. He is not challenging the initial filing of criminal charges against him for the Reinert murders. Rather, his claims go to the manner in which those charges were prosecuted, i.e. the alleged concealment of exculpatory evidence. He is not, therefore, required to allege or prove as an element of his *prima facie* case, that the dismissal of the state charges was based on a determination that he did not commit the Reinert murders. Compare: *Snyder*, *supra*; *McMillian*, *supra*, and *Hudson*, *supra*.

Certainly, no indication of innocence can be gleaned from the opinion of the Pennsylvania Supreme Court discharging Smith. The prosecutorial misconduct was held to be so egregious - intended to prejudice the defendant and thereby deny him a fair trial - that a second trial would violate his double jeopardy rights as guaranteed by the Pennsylvania Constitution. *Commonwealth v. Smith*, *supra*, 615 A.2d at 324-325. Where the Pennsylvania Supreme Court has expressly held that the prosecutorial misconduct "violates all principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause," *Id.* at 324, it would equally violate all principles of justice and fairness to require a showing of innocence as an element of a § 1983 cause of action pertaining to such misconduct.

In rejecting an "indication of innocence" as a necessary element of a § 1983 cause of action, we may not be fully consistent with the common law regarding the tort of malicious prosecution. Section 660 of the Restatement (Second) of Torts (1976) lists four examples of situations in which "a termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution." Comment a to Section 660, headed "*Termination inconsistent with guilt*," then states

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[11] Accord: *Olsen v. Correiro*, Civ. No. 92-10961-PBS, slip op. at 3-5, (D.Mass. Sept. 26, 1994) (1994 WESTLAW 548111) plea of *nolo contendere* pursuant to which plaintiff received a sentence of time served (In his case, five years) plus probation did not constitute a termination of underlying proceedings which would allow plaintiff to bring a section 1983 action under *Heck*, *supra*, for the alleged concealment of exculpatory evidence.

> Proceedings are 'terminated in favor of the accused,' as that phrase is used in § 653 and throughout this Topic, only when their final disposition is such as to indicate the innocence of the accused. . . .

It is apparent that this is a situation in which the analogy to the common law tort of malicious prosecution is not fully apt. That should be no surprise, as we are here formulating a body of federal substantive law - determining the elements of a federally-enacted cause of action, regarding the alleged deprivation of a fair trial. In reaching our conclusions, we have attempted to follow the holding in *Heck*, logically extend the Court's reasoning and also satisfy the concerns of Justice Souter and three of his colleagues as expressed in his concurring opinion.

We believe Justice Souter has correctly read the Court's opinion in *Heck* as providing the "appropriate starting point for the inquiry under §1983," but as not transposing "onto §1983 elements of the malicious-prosecution tort that are incompatible with the policies of § 1983 and the habeas statute as relevant to claims by state prisoners." *Id.* at 402.

Smith's cause of action is not time-barred. It accrued only upon his final discharge, when all habeas exhaustion constraints were removed. The fact that the discharge order and opinion contained no indication of his innocence does not affect the establishment of a cause of action, but may well impact the issue of damages and their causation.

An order will be entered consistent with this memorandum.

s/ James F. McClure, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAY C. SMITH,	:	
Plaintiff	:	NO. 4: CV - 93-1428
v.	:	(McClure)
JOHN J. HOLTZ, et al.,	:	
Defendants	:	

ORDER #1
March 24, 1995

For the reasons stated in the accompanying memorandum, IT IS ORDERED THAT:

1. Plaintiff's Rule 60(b) motion (record document no. 24) is granted.
2. The judgment entered June 27, 1994 on plaintiff's section 1983 claims grounded in the Sixth and Fourteenth Amendments is vacated.
3. Plaintiff's claims asserted on the grounds set forth in paragraph 2 above are reinstated, and the Clerk of Court is directed to reopen this case.
4. The case will proceed to trial on the above claims only.
5. The court will issue a separate order scheduling a case management conference.

s/ James F. McClure, Jr.
United States District Judge

ORDER # (2)

IT IS ORDERED THAT:

1. A case management conference will be held on Friday, April 28, 1995, 1995, at 9:00 a.m., in Chambers, Fourth Floor, Federal Building, 240 West Third Street, Williamsport, Pennsylvania.

2. At least one attorney for each party shall attend the conference, be fully familiar with the case, be fully authorized to make decisions in the case, have full authority to effectuate a complete settlement, and otherwise comply with Local Rule 16.2.

3. Because of the highly unusual nature of this case, counsel must attend the conference in person; it will not be held by telephone conference call.

4. No documents need be filed with the court in anticipation of this conference. However, it is expected that counsel will wish to confer on some of the areas to be covered in order to increase the effectiveness of the conference. A Joint Case Management Plan need not be filed.

5. Topics to be discussed at the conference will include the following:

5.1 Settlement of the entire case;

5.2 Alternate dispute resolution;

5.3 Fixing an initial scheduling order;

5.4 Identifying, defining and clarifying issues of fact and of law genuinely in dispute;

5.5 Reviewing the discovery needs of the parties; considering cost effective discovery through voluntary exchange of information and the use of cooperative discovery devices; scheduling the time and length of all discovery events, including the possible phasing of discovery;

5.6 Appropriateness of bifurcation;

5.7 Potential evidentiary problems;

5.8 Such other matters as may be conducive to the just, speedy and inexpensive resolution of the case.

Filed June 2, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAY C. SMITH,	:	
Plaintiff	:	NO. 1:CV-94-1470
v.	:	JUDGE McCLURE
JOSEPH P. WAMBAUGH,	:	
Defendant	:	

ORDER
June 2, 1995

BACKGROUND:

For the reasons which follow, this court certifies its order #1 dated May 15, 1995 as appropriate for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). In that order for the reasons set forth in the accompanying memorandum, this court held that plaintiff's section 1983 claim (plaintiff's complaint, Count I) is not time-barred under the United States Supreme Court's ruling in *Heck v. Humphrey*, 129 L.Ed.2d 383 (1994). Plaintiff was granted twenty days to amend Count I to remedy the pleading deficiencies. The amended complaint has not yet been filed.

Section 1292 authorizes the district court to facilitate the filing of an interlocutory appeal by certifying, when justified, that a civil order which "not otherwise appealable . . . involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292.

In this case, this court's interpretation of *Heck* and its holding that *Heck* operates to render plaintiff's claims timely filed is a controlling question of law. If this court's interpretation does not stand up on appeal, the defendants may have an absolute defense to all remaining claims asserted entitling them to judgment as a matter of law. If it does stand up on appeal, plaintiff's claims will be resolved on the merits. *Heck* was decided by the United States Supreme Court less than one year ago, and represented in some senses a departure from previously established law. There are few district court decisions and fewer still appellate decisions interpreting the implications of the Court's reliance on the invalidation of the underlying conviction as the triggering mechanism for the accrual of a section 1983 cause of action for an unconstitutionally-obtained conviction. Although this court believes its analysis of that issue in the May 15, 1995 memorandum to be correct, there are, admittedly, substantial grounds for a

difference of opinion on that issue. We, therefore, think it appropriate that the issue be placed before the United States Court of Appeals for the Third Circuit for its consideration at this time.

NOW, THEREFORE, IT IS ORDERED THAT:

1. This court's certifies that the question of whether the United States Supreme Court ruling in *Heck* renders plaintiff's action timely is appropriate for appellate interlocutory review pursuant to 28 U.S.C. § 1292(b), as it involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

2. This certification has no immediate effect on the parties' obligations to go forward with this case at the district court level.

s/ James F. McClure, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 29, 1995
#B-119

No. *95-8043*

JAY C. SMITH, Plaintiff
v.
JOSEPH WAMBAUGH, Defendant

Present: STAPELTON, SCIRICA and ROTH, *Circuit Judges.*
Petition for Permission to Appeal pursuant to 28 U.S.C. Section 1292 (b),

s/ Rita Golden 597-3080
Deputy Clerk

ORDER

The foregoing petition for permission to appeal is granted.

By the Court:
s/ Walter Stapleton
Circuit Judge

Dated: Sep. 15 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-7228 and 95-7533

JAY C. SMITH
V.
JOHN J. HOLTZ, et al.,
Appellants

No. 95-7534

JAY C. SMITH
V.
JOSEPH WAMBAUGH,
Appellant

Present: NYGAARD, ALITO and SAROKIN, *Circuit Judges*

ORDER

The order granting the motion by appellants, John J. Holtz, et al, to consolidate appeals at Nos. 95-7228 and 95-7533 is vacated;

Appeal No. 95-7228 is dismissed; *see National Passenger R.R. Corp. v. Maylie*, 910 F.2d 1181 (3d Cir. 1990);

Appeal No. 95-7533 is consolidated with appeal No. 95-7534; and

Appeals Nos. 95-7533 and 95-7534 will be returned to the court clerk for assignment to a later panel, which will allow sufficient time for full briefing by the parties.

By the Court,
s/ _____
Circuit Judge

Filed August 20, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-7533

JAY C. SMITH
v.
JOHN J. HOLTZ, Bureau of Technical Services, Pennsylvania; RONALD F. COLYER, Bureau of Technical Services, Pennsylvania State Police; VICTOR DOVE; JOHN J. PURCELL, Special Agent In Charge, Central Regional Office, Bureau of Criminal Investigations, Office of the Attorney General; WILLIAM J. LANDER, Bureau of Criminal Investigations, Office of the Attorney General; PAUL YATRON,
Appellants

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and SEITZ,* *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
s/ Walter Stapleton
Circuit Judge

Dated:

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* Judge Seitz's vote is limited to panel rehearing only.

Filed August 20, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-7534

JAY C. SMITH
v.
JOSEPH P. WAMBAUGH,
Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and SEITZ,* *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
s/ Walter Stapleton
Circuit Judge

Dated:

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* Judge Seitz's vote is limited to panel rehearing only.

Filed December 22, 1989

COMMONWEALTH of Pennsylvania, Appellee,
v.
Jay C. SMITH, Appellant.
Supreme Court of Pennsylvania.
Argued May 12, 1988.
Decided Dec. 22, 1989.

William C. Costopoulos, Lemoyne, for appellant.
Robert A. Graci, Chief Deputy Atty. Gen., for appellee.
Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA and PAPADAKOS, JJ.

OPINION

NIX, Chief Justice.

In this appeal this Court must review the three sentences of death imposed upon appellant, Jay C. Smith, by the Court of Common Pleas of Dauphin County for the first degree murder convictions of Susan Reinert and her two children, Michael and Karen Reinert. Appellant raises nineteen assignments of trial error for our review, including a challenge that the evidence is insufficient as a matter of law to sustain the convictions of three counts of murder in the first degree.

In accordance with our responsibility in cases in which the death penalty has been imposed by the finder of fact, this Court has the independent statutory obligation to review the sufficiency of the evidence supporting the conviction. 42 Pa.C.S. § 9711(h). *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937 (1982), *cert. denied*, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). The test to be applied is whether, viewing all of the evidence in the light most favorable to the Commonwealth as verdict winner, and drawing all reasonable inferences favorable to the Commonwealth, there is sufficient evidence to enable the trier of fact to find every element of the crime beyond a reasonable doubt. *Commonwealth v. Jermyn*, 516 Pa. 460, 533 A.2d 74 (1987); *Commonwealth v. Sneed*, 514 Pa. 597, 526 A.2d 749 (1987); *Commonwealth v. Holzer*, 480 Pa. 93, 389 A.2d 101 (1978); *Commonwealth v. Kichline*, 468 Pa. 265, 361 A.2d 282 (1976).

The Commonwealth need not prove the homicide by direct evidence; indeed in many instances, no witnesses are available to describe the incident which resulted in the death of the victim. Rather the Commonwealth may prove the homicide by circumstantial evidence. *See*,

e.g., *Commonwealth v. Romano*, 392 Pa. 632, 141 A.2d 597 (1958); *Commonwealth v. Lettrich*, 346 Pa. 497, 31 A.2d 155 (1943). The Commonwealth may establish the fact of a homicide by proving the death of the victim and establishing that the death resulted from criminal means. *Commonwealth v. Williams*, 455 Pa. 539, 316 A.2d 888 (1974); *Commonwealth v. Dews*, 429 Pa. 555, 239 A.2d 382 (1968); *Commonwealth v. Frazier*, 411 Pa. 195, 191 A.2d 369 (1963); *Commonwealth v. Deyell*, 399 Pa. 563, 160 A.2d 448 (1960); *Commonwealth v. Homeyer*, 373 Pa. 150, 94 A.2d 743 (1953).

In assessing the sufficiency of the evidence to establish that a homicide was committed and that the person or persons charged were those responsible, we are called upon to consider all of the testimony that was presented to the jury during the trial, without consideration as to the admissibility of that evidence. The question of sufficiency is not assessed upon a diminished record. *Commonwealth v. Rawles*, 501 Pa. 514, 462 A.2d 619 (1983); *Commonwealth v. Lovette*, 498 Pa. 665, 450 A.2d 975 (1982), *cert. denied*, 459 U.S. 1178, 103 S.Ct. 830, 74 L.Ed.2d 1025 (1983); *Commonwealth v. Cohen*, 489 Pa. 167, 413 A.2d 1066, *cert. denied*, 449 U.S. 840, 101 S.Ct. 118, 66 L.Ed.2d 47 (1980); *Commonwealth v. Harper*, 485 Pa. 572, 403 A.2d 536 (1979); *Commonwealth v. Hoskins*, 485 Pa. 542, 403 A.2d 521 (1979); *Commonwealth v. Firth*, 479 Pa. 333, 388 A.2d 683 (1978); *Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976). Where improperly admitted evidence has been allowed to be considered by the jury, its subsequent deletion does not justify a finding of insufficient evidence. The remedy in such a case is the grant of a new trial. *Commonwealth v. Fortune*, 464 Pa. 367, 346 A.2d 783 (1975); *Commonwealth v. Poteet*, 434 Pa. 230, 253 A.2d 246 (1969); *Commonwealth v. Gist*, 433 Pa. 101, 249 A.2d 351 (1969); *Commonwealth v. Pearson*, 427 Pa. 45, 233 A.2d 552 (1967).

In this case the jury returned verdicts of guilt premised upon three acts of murder: the death of Ms. Susan Reinert, and the deaths of her two minor children. We will first assess the evidence in support of a finding that Ms. Reinert was murdered and that appellant participated in that act.

The Commonwealth presented evidence to establish that the nude body of Susan Reinert was found in the hatchback trunk compartment of a vehicle that was later discovered to have been owned by the victim. This vehicle was found in the parking lot of a Host Inn situated in Swatara Township, Dauphin County. The macabre discovery was made by a township police officer at approximately 5:20 a.m. on Monday, June 25, 1979. Earlier, at approximately 2:00 a.m., the same officer had observed the vehicle and noticed the hatch was up. At that point he intended to

investigate further but was distracted by a radio dispatch requiring him to attend another matter. He subsequently returned to the area in response to an anonymous telephone call made to the Dauphin County police department. Later investigation revealed that the vehicle with the trunk open and an object protruding had been observed on June 24, 1979, at approximately 7:00 p.m.

The clothes of the victim could not be found, nor was there any evidence of the identity of the deceased. The victim was later identified as Susan Reinert, a teacher at the Upper Merion High School, located in Upper Merion Township where appellant herein was formerly the principal. A forensic pathologist determined that Ms. Reinert had sustained massive hemorrhaging in the eye area and abrasions over her body. He also opined that certain prominent bruises on the back of the body of the victim were consistent with the imprint of a chain. The cause of death was determined to be asphyxiation resulting from an overdose of morphine, which was consistent with having been caused by criminal agency. It was the pathologist's opinion that death probably occurred during the morning hours of Sunday, June 24, 1979.

The last persons to see Ms. Reinert alive were a next door neighbor, Ms. Mary Grove and her granddaughter, Beth Ann Brook. These witnesses testified they saw Ms. Reinert and Michael and Karen on Friday, June 22, 1979, at approximately 9:20 p.m. on the porch of the Reinert's home, and shortly thereafter heard the group drive away from the home in Ms. Reinert's automobile. The granddaughter testified Karen Reinert was wearing a little green pin with a white "P". At the time in question Karen was age eleven and Michael was age ten. The children of Ms. Reinert have not been seen or heard from since. There is no question that Ms. Reinert's death resulted from a criminal agency and the defense does not dispute that point. Thus, the sufficiency of the evidence as to the death by criminal agency of Ms. Reinert was clearly established.

The Commonwealth introduced evidence that, from approximately 1973 until the time of her death, Reinert had been romantically involved with William S. Bradfield, a fellow English teacher at Upper Merion High School.[1] Reinert, believing Bradfield and she were to be married, began arranging her finances in favor of him, such as making him the primary beneficiary of her will and the sole beneficiary of $730,000.00 in life insurance benefits. The victim also had arranged to make Bradfield the guardian of her children in the event of her death. The arrangements were

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[1] Bradfield had been convicted on three counts of murder in the first degree for the deaths of Ms. Reinert and her two children prior to the trial in this matter. He was not called as a witness in the trial against Smith.

kept secret by Bradfield who told his friends, and his lover, Susan Myers, that Reinert was enamoured of him but that he was not interested in her, all the while promising Reinert he would marry her in the summer of 1979.

Appellant was the principal of the high school where the victim taught. There was no evidence of any relationship other than a professional one between Smith and the victim. The theory of the Commonwealth was that a conspiracy was formed between Smith and Bradfield to share in the monetary reward that would be available to Bradfield upon the untimely demise of Ms. Reinert. An additional reason offered was that Ms. Reinert was killed to assure that she would not disclose that Bradfield had offered perjured testimony on Smith's behalf in an earlier, unrelated theft trial.

The earlier theft occurred in a Sears store in the St. David's Mall, Montgomery County[2], in August 1977. It was further established that Bradfield appeared as a witness at the theft trial and offered alibi testimony on Smith's behalf. Between the date of the theft and the trial of that matter in May of 1979, Bradfield and Smith established what the Commonwealth contended was a conspiratorial relationship. The Commonwealth in the instant trial called the witnesses from the theft trial to establish that Smith was indeed in the Sears store at the time of the theft. This evidence was offered to establish that Bradfield's testimony in the former trial was untrue. An agent of the Federal Bureau of Investigation testified that an unsigned, typed letter dated October 1978 (N.T. 4/21/86, Vol. 16, Exhibit 26) discussed a telephone code system as well as proposed alibi testimony for the theft trial. A fingerprint of Smith was found on an envelope which purportedly contained the letter.[3] This evidence was offered to support the Commonwealth's theory that a criminal conspiracy emerged from the effort of Smith to avoid conviction at the theft trial and continued over to the instant murders.

Items of physical evidence were produced by the prosecution in support of its theory of the case. A green pin with a white "P", similar to the one being worn by Karen Reinert when she was last seen alive by the neighbors, was recovered from under the front seat of Jay Smith's car. A hair similar to Susan Reinert's was found inside the home of Smith. Fibers found on Reinert's body during the autopsy similar to those from the carpet in the basement of Smith's home. A comb was discovered under the

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[2] Although the theft occurred in Montgomery County, the trial in that case was held before the Court of Common Pleas in Dauphin County as a result of the grant of a motion for a change of venue (N.T. 4/17/86, Vol. 14 at 2223).

[3] It is unclear from the testimony whether the letter was contained at any time in the envelope. Fingerprint analysis performed on the letter revealed no latent prints.

lifeless body of Ms. Reinert in the rear portion of her vehicle. The comb was imprinted with the numbers and letters "79 USARCOM." Smith was formerly a member of the 79 USARCOM, a U.S. military unit. A bag of identical combs was subsequently retrieved from Smith's home. The Commonwealth produced a letter from Smith to his wife requesting that she dispose of the carpet in their home and that she clean the interior of his automobile.[4]

The Commonwealth also presented the testimony of two fellow immates of appellant during his confinement for the theft charges. This evidence showed that Smith requested one of these fellow prisoners kill the state police detectives investigating this case. Another former fellow prisoner testified that Smith had confessed his complicity in the murders, stating his motives were money and fear that Susan Reinert would reveal the perjured alibi testimony. The former prisoners also testified to escape plans formulated by Smith.

Viewing this evidence in a light most favorable to the prosecution and drawing all reasonable inferences favorable to that side, there was sufficient evidence presented to the jury in this case to establish each of the elements of the charge relating to the death of Ms. Reinert beyond a reasonable doubt.

In assessing the evidence of the death of the two children of Ms. Susan Reinert, we are confronted with the further problem resulting from the fact that their bodies have never been found. In a homicide prosecution, the Commonwealth need not produce the body of the victim, if the corpus delicti is established circumstantially. *Commonwealth v. Burns*, 409 Pa. 619, 187 A.2d 552 (1963); *Commonwealth v. Agoston*, 364 Pa. 464, 72 A.2d 575, *cert. denied*, 340 U.S. 844, 71 S.Ct. 9, 95 L.Ed. 619. A presumption of death arises where a person who has been absent from his home for a period of seven years has been neither seen nor heard from during that period. *Groner v. Knights of Maccabees*, 265 Pa. 129, 108 A. 437 (1919); *Maley v. Pennsylvania Railroad Co.*, 258 Pa. 73, 101 A. 911 (1917).[5]

As previously stated, the children were last seen on the evening of June 22, 1979, in the company of their mother. Upon the discovery of the death of the mother, the police conducted a diligent search to ascertain the

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[4] This letter was written by Smith from prison where he had been incarcerated since June 26, 1979, as a result of the theft charges.

[5] Although the cases cited in support of a presumption of death arose in the context of civil litigation, the factors giving rise to the presumption are equally valid in criminal matters. Whereas in the civil law, these factors would support a presumption, in the criminal law they support a permissible inference. *See e.g., Commonwealth v. DiFrancesco*, 458 Pa. 188, 329 A.2d 204 (1974).

whereabouts of the children to no avail. The children had a close relationship with both their father and their paternal grandmother. Additionally, it was established that the children knew how to reach both their father and paternal grandmother by telephone and also were aware of where they lived. According to the testimony of both father and the grandmother, neither heard from the children after June 22, 1979. The Commonwealth produced evidence that a nationwide search was initiated by the FBI, which assigned eighteen agents full-time for five months in the investigation to ascertain the whereabouts of these children. These agents were further assisted in the search by each of the fifty-nine FBI field offices throughout the nation. Every lead received during this period was thoroughly investigated. The length of the absence, its unexplained character, the failure of the children to communicate with all known relatives and associates, the nature of the relationship of the children with their family and their dependency upon their family because of their minority all lead to the inevitable conclusion that they shared their mother's fate and are no longer alive. Under these circumstances, the applicability of an inference of their death as a result of criminal agency is appropriate, and the jury could properly infer that those who caused the death of their mother also were responsible for a similar fate of the children.

Again, appellant herein raises numerous assignments of trial error in addition to the challenge of the sufficiency of the evidence. After our review of this matter, we are constrained to conclude that appellant's challenge to the admission of the contents of statements allegedly made by Bradfield to various individuals is valid and the admission of the testimony constituted reversible error. Because of our resolution of the matter, we need not consider the remaining assignments of error.[6]

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[6] The other claims of appellant not considered herein are as follows:
(a) Whether the trial court erred in allowing the prosecutor to retry appellant's theft trial during this case;
(b) Whether the trial court erred in admitting testimony that appellant wanted the investigating officers and Bradfield killed where the probative value of the evidence was outweighed by its undue prejudice;
(c) Whether the court improperly admitting plans to escape as evidence of consciousness of guilt;
(d) Whether the court erred in refusing to allow transcripts and video conversations to go out with the jury where those items were misquoted out of context by the prosecutor in his closing;
(e) Whether the court erred in admitting copies of letters seized from appellant mailed to his attorney where such letters were confidential communications;
(f) Whether the trial court erred in denying a motion for a change in venue;
(g) Whether after-discovered evidence and prosecutorial misconduct requires a new trial where the prosecutor had an agreement with one of appellant's former jailmates, in

The evidence in question was provided by several individuals who were close friends or paramours of Bradfield. The testimony related to statements made to them on various occasions by Bradfield concerning the activities of Smith in connection with the murders of Ms. Reinert and her children. The Commonwealth conceded that the contents of the statements were fabrications designed to portray Smith as a vicious, depraved killer in an effort to cast blame upon Smith for these murders. (N.T. 4/10/86, Vol. 9 at 1390-92.)

The first of the witnesses was Vincent Valaitis, a fellow English teacher at Upper Merion High School. This witness was allowed to testify that Bradfield told him in the fall of 1978 that he, Bradfield, volunteered to serve as an alibi witness for Smith during the theft trial. It was subsequently made clear that the testimony that Bradfield was intended to offer on Smith's behalf was untrue. He was permitted to relate a number of conversations on various occasions where Bradfield had described Smith as a dangerous individual who intended to harm a number of individuals, including Reinert. He testified that on one occasion Bradfield told him that Smith "was a screened hitman for the Mafia and wanted to kill a number of people, including Susan Reinert." (N.T. 4/10/86, Vol. 9 at 1401.) He also stated that Smith had given him instructions on how to make a gun silencer. Further, additional statements in this vein attributed

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exchange for his testimony, which was not revealed to appellant in violation of the Brady rule;
(h) Whether the prosecutor's closing remarks were inflammatory and highly prejudicial where he used evidence of the theft trial as evidence of appellant's guilt;
(i) Whether the prosecutor's closing remarks, accusing a retired state police officer of committing perjury, were so inflammatory and prejudicial as to require a new trial;
(j) Whether a new trial is warranted where the prosecutor introduced evidence which flagrantly violated an on-the-record pre-trial agreement;
(k) Whether the evidence is insufficient as a matter of law to support the finding of any aggravating circumstances;
(l) Whether his death sentence should be vacated because it is disproportionate to that received by the co-conspirator who was convicted on the same evidence;
(m) Whether the sentence of death must be vacated where the court refused to instruct the jury that they had an absolute right to arrive at a non-unanimous verdict;
(n) Whether the death sentence must be vacated where the court erred in denying a directed verdict for life imprisonment based on the prosecutor's improper argument that torture could be found as an aggravating circumstance where he asserted Reinert had witnessed the murder of her children, an allegation completely unsupported by evidence;
(o) Whether the court erred in charging the jury during the penalty phase not to consider sympathy in its deliberations;
(p) Whether the death sentences must be vacated where the prosecutor's cross-examination of appellant during the penalty phase denied appellant his right to allocution;
(q) Whether the death penalty is cruel and unusual punishment in violation of the U.S. and Pennsylvania Constitution.

to Smith by Bradfield were: he, Smith, "knew how to take an ordinary household item and kill anyone with it"; (N.T. 4/10/86, Vol. 9 at 1407 and 4/15/86, Vol. 12 at 1792) that Smith was able to tape up and immobilize a person very quickly; and that Smith stated that, "the best time to commit murders would be during holidays." (N.T. 4/10/86, Vol. 9 at 1409 and 4/11/86, Vol. 10 at 1593.) Valaitis was also permitted to testify that Bradfield had urged him, on the weekend of the killings, to join Bradfield on a trip to the New Jersey shore. Susan Myers and Chris Pappas also accompanied Bradfield on this trip. Bradfield told the group that Smith was going to kill Ms. Reinert during that weekend and their presence with him (Bradfield) would serve to provide an alibi. On that occasion, the witnesses quoted Bradfield as saying, "I'm afraid this is it. I'm afraid this is the night that Jay C. Smith is going to kill Susan Reinert. I followed him. He circled her house 14 times, and I lost him in a hailstorm.... "(N.T. 4/10/86, Vol. 9 at 1416.) Upon their return from their trip, Bradfield went to his apartment, made a telephone call, returned and stated to the witness, "Jay C. Smith's in jail. Smith's in jail. Thank God Smith's in jail. I saved that f-----g woman's life,...." (N.T. 4/10/86, Vol. 9 at 1416.)

Previously Bradfield had called upon this witness to travel out of the area with him to establish an alibi for that time period. This occurred during the Christmas holidays in 1978. At that time Bradfield told this witness that it was his (Bradfield's) belief that Smith intended to kill Susan Reinert. On that occasion, the witness, Bradfield, and Susan Myers had travelled to Florida for the express purpose of providing an alibi for Bradfield in the event that Smith did carry out his alleged threat to kill Reinert at that time. (N.T. 4/10/86, Vol. 9 at 1408-9.)

The testimony of the other witnesses was similar in content and character. In each instance the information was supplied to the individuals by Bradfield, and in each case it related to the purported actions of Smith. For instance, Mr. Olsen, who is alleged to have met Bradfield in New Mexico on June 26, 1979, the day after the discovery of Ms. Reinert's body, was permitted to discuss the conversation that occurred between him and Bradfield on that occasion. On that occasion, in response to the prosecutor's inquiry as to what Bradfield had said to him, the witness was permitted to state: "... I'll quote him [Bradfield], he said, Smith killed that g-- d--- woman" (N.T. 4/14/86, Vol. 11 at 1742). Susan Myers, an admitted lover of Bradfield, was permitted to testify that Bradfield told her that Smith had committed thefts and had committed other murders, that "Dr. Smith intended to kill Susan Reinert" and that Dr. Smith "tended to kill on holidays" (N.T. 4/11/86, Vol. 12 at 1593). Wendy Zeigler, who was characterized as enamored of Bradfield, testified that Bradfield told her that Smith was "mentally unstable", that he intended to kill Susan

Reinert, and that he had a list of people to dispatch (N.T. 4/14/86, Vol. 11 at 1690). Chris Pappas was permitted to testify that Bradfield told him that Smith was under investigation for several crimes and that he "wanted to kill the judge, the people leading the investigation and people who were remotely associated with the investigation" (N.T. 4/15/86, Vol. 12 at 1785). Finally, Pappas testified that, after Bradfield received a call advising him of the murder of Susan Reinert, he stated, "... apparently Jay Smith had gone through with his threats and had killed her" (N.T. 4/15/86, Vol. 12 at 1833).

In the trial of this case Bradfield was not called upon to testify, nor did the appellant testify on his own behalf. It is well settled in our law that hearsay evidence is inadmissible unless it qualifies under one of the recognized exceptions to that rule. 5 Wigmore, *Evidence* § 1420 *et seq.* (Chadbourn Rev.1974); McCormick, *Evidence*, § 249 (2d ed. 1972). The above described statements, wherein third parties were permitted to relate to the jury declarations of Bradfield purporting to represent statements made by Smith and his observations of Smith's state of mind, if offered for the truth of their content, are clearly hearsay. *United States v. Durant*, 730 F.2d 1180 (8th Cir.) *cert. denied*, 469 U.S. 843, 105 S.Ct. 149, 83 L.Ed.2d 87 (1984); *United States v. Reynolds*, 715 F.2d 99 (3d Cir.1983); *United States v. Fox*, 613 F.2d 99 (5th Cir.1980); *United States v. Williams*, 616 F.2d 759 (5th Cir.), *cert. denied*, 449 U.S. 857, 101 S.Ct. 156, 66 L.Ed.2d 72 (1980); *Pauling v. News Syndicate Co.*, 335 F.2d 659 (2d Cir.1964) *cert. denied*, 379 U.S. 968, 85 S.Ct. 662, 13 L.Ed.2d 561 (1965); *Commonwealth v. Griffin*, 511 Pa. 553, 515 A.2d 865 (1986), *cert. denied*, 480 U.S. 940, 107 S.Ct. 1590, 94 L.Ed.2d 779 (1987); *Commonwealth v. Sampson*, 454 Pa. 215, 311 A.2d 624 (1973); *Commonwealth v. Glover*, 446 Pa. 492, 286 A.2d 349 (1972); *Commonwealth v. Jacobs*, 445 Pa. 364, 284 A.2d 717 (1971) *cert. denied*, 409 U.S. 856, 93 S.Ct. 135, 34 L.Ed.2d 100 (1972); *see also*, *Petition of Earle*, 355 Mich. 596, 95 N.W.2d 833 (1959); *Mash v. Missouri Pacific Railroad Co.*, 341 S.W.2d 822 (Mo.1960); *Ellsworth v. Watkins*, 101 N.H. 51, 132 A.2d 136 (1957); *Wilson v. Hartford Accident & Indemnity Co.*, 272 N.C. 183, 158 S.E.2d 1 (1967); *Auseth v. Farmers Mutual Automobile Insurance Co.*, 8 Wis.2d 627, 99 N.W.2d 700 (1959). The admission of hearsay evidence would constitute error, *United States v. Reynolds*, *supra*; *United States v. Blair*, 456 F.2d 514 (3d Cir.1972); *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986), *cert. denied*, 479 U.S. 1070, 107 S.Ct. 962, 93 L.Ed.2d 1010 (1987); *Commonwealth v. Bridge*, 495 Pa. 568, 435 A.2d 151 (1981); *Commonwealth v. Baez*, 494 Pa. 388, 431 A.2d 909 (1981); *Commonwealth v. Thornton*, 494 Pa. 260, 431 A.2d 248 (1981), unless it is established that the error was harmless. *Commonwealth v. Floyd*, 506 Pa.

85, 484 A.2d 365 (1984); *Commonwealth v. Turner*, 499 Pa. 579, 454 A.2d 537 (1982); *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155 (1978); *Commonwealth v. Pearson*, 427 Pa. 45, 233 A.2d 552 (1967). If the error is not harmless beyond a reasonable doubt, we are required to reverse the judgment and to award a new trial. *See Turner, supra*; *Commonwealth v. Baez, supra*; *Story, supra*; *Commonwealth v. Linde*, 448 Pa. 230, 293 A.2d 62, *cert. dismissed*, 409 U.S. 1031, 93 S.Ct. 523, 34 L.Ed.2d 482 (1972).

The predicate supporting the rejection of hearsay evidence is its assumed unreliability because the declarant from which the statement originates is not before the trier of fact and therefore cannot be challenged as to the accuracy of the information sought to be conveyed. *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); *Stidum v. Trickey*, 881 F.2d 582 (8th Cir.1989); *Martinez v. Sullivan*, 881 F.2d 921 (10th Cir.1989); *United States v. Koskerides*, 877 F.2d 1129 (2d Cir.1989); *United States v. Bentley*, 875 F.2d 1114 (5th Cir.1989); *Commonwealth v. Galloway*, 476 Pa. 332, 382 A.2d 1196 (1978); *Commonwealth v. Porter*, 449 Pa. 153, 295 A.2d 311 (1972); *Commonwealth v. Ransom*, 446 Pa. 457, 288 A.2d 762 (1972). It also offends an essential concept of this nation that an accused has a fundamental right to confront his accuser. *Dutton v. Evans, supra*; *Commonwealth v. Galloway, supra*; *Ransom, supra*.

The dilemma that faces the Commonwealth is that, having conceded the unreliability of the utterances, it has foreclosed the possibility of justifying the admission of the utterances under an exception to the hearsay rule. The exceptions to the hearsay rule are premised upon circumstances surrounding the making of the utterances which would assure the reliability of the contents. Thus, having conceded the unreliability of the utterances, there can be no basis for an exception to the general rule prohibiting hearsay evidence.[7]

The Commonwealth attempts to avoid the hearsay quality of its evidence by asserting that the testimony was not being offered for the truth of its content. The hearsay concern is not present where statements of an out-of-court declarant are not being offered for the truth of the content of those statements. For instance, a witness may testify to a statement made to him when the purpose of its introduction is the fact that the statement was, in fact, made, *Commonwealth v. Sampson*, 454 Pa. 215, 311 A.2d 624 (1973); *Commonwealth v. Jacobs*, 445 Pa. 364, 284 A.2d 717 (1971), *cert.*

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[7] The "rule" arises in the exclusion of evidence which is not "first hand" but possesses the indicia of reliability that would justify its consideratio It is to accommodate this legitimate concern that we have created exceptions to the hearsay rule. Those exceptions have been carefully defined and should not be expanded solely to justify a conviction.

denied, 409 U.S. 856, 93 S.Ct. 135, 34 L.Ed.2d 100 (1972); *Commonwealth v. Ricci*, 332 Pa. 540, 3 A.2d 404 (1939). Similarly, we have recognized that out-of-court statements which are offered to prove the declarant's state of mind are not within the interdiction of the hearsay rule, *Commonwealth v. Jermyn*, 516 Pa. 460, 533 A.2d 74 (1987); *Commonwealth v. Murphy*, 493 Pa. 35, 425 A.2d 352 (1981); *Commonwealth v. Wright*, 455 Pa. 480, 317 A.2d 271 (1974); *Commonwealth v. Santos*, 275 Pa. 515, 119 A. 596 (1923).

In this instance the Commonwealth argues the testimonial value of these statements was the effect they had upon the listeners. *See Commonwealth v. Dehart*, 512 Pa. 235, 516 A.2d 656, *cert. denied*, 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987); *Commonwealth v. Cruz*, 489 Pa. 559, 414 A.2d 1032 (1980); *Commonwealth v. Ricci*, *supra*. The key to the admission of evidence for this purpose is that no assertive or testimonial use is sought to be made of the content of the utterances. *Commonwealth v. Dehart*, at 254, 516 A.2d at 666; *Commonwealth v. Cruz*, *supra*; *Commonwealth v. Ricci*, *supra*. The difficulty with this theory in the instant appeal is relevancy. The test for relevancy is whether the proffered evidence tends to make a material fact more or less probable. *Martin v. Soblotney*, 502 Pa. 418, 422, 466 A.2d 1022, 1024 (1983); *Commonwealth v. Brown*, 489 Pa. 285, 414 A.2d 70 (1980); *Commonwealth v. Chism*, 480 Pa. 233, 389 A.2d 1041 (1978); J. McCormick, *Evidence* § 185 (2d ed. 1972). Fed.R.Evid. 401.

The motives for the actions of the associates Bradfield had no bearing upon the guilt of Smith. These witnesses had no relationship with Smith. As defense counsel repeatedly noted during trial, these witnesses had no personal knowledge of any association between Smith and Bradfield, and they certainly had no personal knowledge of a conspiracy between the two to kill the Reinerts. Therefore, their motives for responding to the various requests of Bradfield were totally unrelated to the material issue for the motives shed no light upon any complicity of Smith.

An equally serious flaw in the theory of the Commonwealth to justify this evidence is its reliance upon speculation as to Bradfield's motive in conveying false information. The Commonwealth contends that these statements were made by Bradfield in furtherance of the conspiratorial design between Bradfield and Smith to dispatch the Reinerts. While proof of the deliberate duplicity of Bradfield would be relevant in a trial against him, *Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982); *Commonwealth v. Kravitz*, 400 Pa. 198, 161 A.2d 861 (1960), *cert. denied*, 365 U.S. 846, 81 S.Ct. 807, 5 L.Ed.2d 811 (1961); *Commonwealth v. Sauders*, 390 Pa. 379, 134 A.2d 890 (1957), it cannot,

standing alone, be used against Smith. There must be independent evidence to establish that Bradfield's motive for making these false statements was indeed for the purpose of furthering the aims of the alleged conspiracy between Bradfield and Smith. *United States v. Gibbs*, 739 F.2d 838 (3d Cir.1984), *cert. denied*, 469 U.S. 1106, 105 S.Ct. 779, 83 L.Ed.2d 774 (1985); *United States v. Jannotti*, 729 F.2d 213 (3d Cir.1984), *cert. denied*, 469 U.S. 880, 105 S.Ct. 243, 83 L.Ed.2d 182 (1984); *United States v. Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied, sub nom., Stillman v. U.S.*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983); *United States v. Frumento*, 426 F.Supp. 797 (E.D.Pa.1976), *aff'd*, 552 F.2d 534, *aff'd*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied, sub nom., Millhouse v. United States*, 434 U.S. 1072, 98 S.Ct. 1256, 55 L.Ed.2d 775 and, *cert. denied, sub nom., Sills v. United States*, 434 U.S. 1072, 98 S.Ct. 1258, 55 L.Ed.2d 776 (1978); *Commonwealth v. Dreibelbis*, 493 Pa. 466, 426 A.2d 1111 (1981); *Commonwealth v. Coccioletti*, 493 Pa. 103, 425 A.2d 387 (1981); *Commonwealth v. Garcia*, 478 Pa. 406, 387 A.2d 46 (1978); *Commonwealth v. Holloway*, 429 Pa. 344, 240 A.2d 532 (1968). Absent such proof, this evidence cannot be employed to reflect upon the guilt of the instant appellant. *United States v. Gibbs, supra*; *United States v. Jannotti, supra*; *United States v. Ammar, supra*; *Stillman v. United States, supra*; *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir.1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980); *United States v. Schoenhut*, 576 F.2d 1010 (3d Cir.), *cert. denied*, 439 U.S. 964, 99 S.Ct. 450, 58 L.Ed.2d 421 (1978); *Commonwealth v. Pinkins*, 514 Pa. 418, 525 A.2d 1189, *cert. denied*, 484 U.S. 867, 108 S.Ct. 192, 98 L.Ed.2d 144 (1987); *Dreibelbis, supra*; *Garcia, supra*; *Commonwealth v. Petrillo*, 338 Pa. 65, 12 A.2d 317 (1940).

Whether or not there is evidence that strongly suggests a finding of guilt, it is the responsibility of the Commonwealth to prove that conduct by legally sufficient evidence. Lest we, as a society, be accused of being barbaric, we must objectively test compliance with our standards before imposing such a penalty. Regardless of personal predelictions, the law must strictly adhere to these fundamental precepts in the decision-making process.

For the foregoing reasons, we are constrained to conclude that the convictions must be reversed and the cause remanded for a new trial.[8]

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[8] On January 19, 1989, this Court ordered the Court of Common Pleas of Dauphin County to conduct an evidentiary hearing regarding certain evidence in the Commonwealth's possession, which may have been exculpatory in nature, but which was never disclosed to the defense. The evidence in question was a "rubber lifter", an evidence collection device, which allegedly contained grains of sand found on Mrs. Reinert's feet during the autopsy. Appellant argued that this evidence was significant to his defense in that it would have

supported his theory that Mrs. Reinert was killed at the seashore by Bradfield and his associates. In view of our disposition, we need not consider this issue in determining whether a new trial should be granted. This evidence will now be available at a subsequent trial, and the jury will be given the opportunity to assess its import within the totality of the evidence presented.

Filed September 18, 1992

COMMONWEALTH of Pennsylvania, Appellee,
v.
Jay C. SMITH, Appellant.
Supreme Court of Pennsylvania.
Argued May 6, 1992.
Decided Sept. 18, 1992.

William C. Costopoulos, Lemoyne, for appellant.

Robert A. Graci, Chief Deputy Atty. Gen. and Anthony Sarcione, Executive Deputy Atty. Gen., for appellee.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and CAPPY, JJ.

OPINION OF THE COURT

FLAHERTY, Justice.

In this infamous murder case, we are compelled to order the discharge of appellant Jay C. Smith. Despite our prior holding granting a retrial, *Commonwealth v. Smith*, 523 Pa. 577, 568 A.2d 600 (1989), we now hold that the prosecutorial misconduct during appellant's first trial was not only impermissible, but had constitutional implications under the double jeopardy clause which prohibit retrial.

At issue is whether the double jeopardy clause bars retrial following intentional prosecutorial misconduct designed to secure a conviction through the concealment of exculpatory evidence; previously, we have held that "double jeopardy will attach only to those mistrials which have been intentionally caused by prosecutorial misconduct." *Commonwealth v. Simons*, 514 Pa. 10, 16, 522 A.2d 537, 540 (1987), adopting the federal constitutional standard set forth in *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). The Superior Court recognized that our prior remand did not foreclose this question, and it considered the issue and the claim of double jeopardy to be outside the scope of the direct appeal. *Commonwealth v. Smith*, 404 Pa.Super. 553, 557, 591 A.2d 730, 732 (1991). Superior Court's view is supported by the fact that the after-discovered evidence of prosecutorial misconduct during appellant's trial was unknown to appellant during his direct appeal and was not presented to this court at that time. Both the trial court and the Superior Court, *Commonwealth v. Smith*, *supra* at 559, 591 A.2d at 733, in proceedings following remand, found that intentional prosecutorial misconduct had been proved by appellant but deferred the

remedy, a question of first impression, to this court. We granted allocatur to consider this question.

Inasmuch as a more detailed description of the crimes charged against appellant is contained in our prior opinion, *Smith, supra*, 523 Pa. 577, 568 A.2d 600, we abridge our description of the case for purposes of this appeal. Schoolteacher Susan Reinert and her two young children were murdered in June, 1979. William Bradfield, who was her fiancé and fellow schoolteacher, and appellant, who was the principal of their school, allegedly had conspired to murder Mrs. Reinert in order to recover the proceeds of insurance policies on her life which named her fiancé as beneficiary. The Commonwealth presented physical evidence linking appellant to the murders as well as various other testimonial evidence which, together, this court regarded as sufficient to sustain appellant's conviction. *Id.* at 586, 568 A.2d at 605. Nevertheless, this court held that appellant was entitled to a new trial due to the admission of impermissible hearsay testimony by associates of alleged co-conspirator Bradfield. *Id.* at 588-96, 568 A.2d at 605-09.

Before appellant could be retried, he filed a motion to preclude a new trial based on double jeopardy because of after-discovered evidence of prosecutorial misconduct. He alleged that the Commonwealth withheld potentially exculpatory physical evidence during his first trial and that the Commonwealth knowingly denied the existence of the agreement which existed with its chief witness whereby the witness received favorable sentencing treatment in exchange for his testimony against appellant. These alleged Commonwealth tactics were clearly in violation of the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and, if proved, would, at the very least, entitle appellant to a new trial pursuant to *Brady*. Under the holding of *Commonwealth v. Simons, supra*, however, appellant would not be entitled to discharge to avoid double jeopardy, for the violation was not based on a "claim that the prosecutor *intended to provoke a mistrial*." *Id.* 514 Pa. at 20, 522 A.2d at 542 (emphasis in original). Appellant presents the case hypothesized in *Simons*, "where the Commonwealth conceals its efforts to subvert the truth-determining process, ... [where there is] no intent to goad the defendant into moving for a mistrial. Quite the opposite, the intent would be that the defendant should never know how his wrongful conviction came about." *Simons*, supra at 23, 522 A.2d at 544 (Flaherty, J., concurring).

After appellant's direct appeal from his first trial, he acquired evidence that the Commonwealth had obtained his conviction by overreaching in two respects. Specifically, he learned that the prosecution's chief witness, Mr. Martray, who denied the existence of any

bargain in exchange for his testimony against appellant, was in fact awaiting sentencing for unrelated crimes and did in fact receive favorable treatment by the Commonwealth at his sentencing. Appellant was thereby precluded from impeaching Mr. Martray's veracity by exposing his motivation to testify falsely against appellant in order to minimize his own punishment. Secondly, appellant learned that the Commonwealth knowingly withheld physical evidence by hiding the fact that grains of sand were discovered between the toes of the murder victim at her autopsy, failing to present this evidence at appellant's trial and failing to apprise appellant of the evidence in compliance with Brady, supra. The significance of the sand lay in the fact that the scene of Susan Reinert's murder was unresolved; it was possible that the murder did not take place where the body was discovered but somewhere else and that the body was afterwards moved to the place of discovery. The prosecution theory was that the murder took place in Pennsylvania, whereas the defense theory was that the murder occurred in Cape May, New Jersey, where Bradfield had been and appellant had not. Thus the existence of the sand was potentially exculpatory to appellant, and the Commonwealth deliberately concealed the evidence for more than two years after the trial.

Due to the fact that appellant learned of these incidents of misconduct long after his trial, they were not part of the record at the time of his direct appeal. Upon remand to the trial court, appellant moved for discharge on the basis of the afterdiscovered evidence. Hearings were held, and the trial court found as fact that both incidents of misconduct were committed by the Commonwealth. The adhesive "lifters" used to remove and retain the sand from between the victim's toes were discovered by the Commonwealth during appellant's trial but were not disclosed to appellant despite the prosecutor's awareness of their importance. This is established by a mid-trial memorandum from the assistant attorney general who prosecuted appellant to his superior, the executive deputy attorney general, stating: "It is obvious from [defense counsel's] tactics thus far that he will attempt to establish that Mrs. Reinert was killed at the shore in Cape May, New Jersey by William Bradfield, Chris Pappas, and Susan Myers. The sand, therefore, is extremely material to the defense case." Similarly, the Commonwealth deliberately denied the existence of the agreement pursuant to which its witness, Mr. Martray, received extremely lenient treatment at his sentencing in return for his testimony against appellant.

Such misconduct, standing alone, would suffice to implicate the protection of the double jeopardy clause. But further examination of the record establishes the bad faith of the prosecution beyond any possibility

of doubt; indeed, it would be hard to imagine more egregious prosecutorial tactics.

One of the Commonwealth's witnesses was Corporal John Balshy, a former Pennsylvania state trooper who had investigated the Reinert murders and been present during the victim's autopsy. He testified on cross-examination that he had used adhesive lifters to remove granular particles which looked like sand from between the victim's toes. The Commonwealth excoriated Corporal Balshy, implying that he had fabricated his testimony about the adhesive lifters. The Commonwealth then presented the testimony of other state police officers who had attended the autopsy and did not remember the sand or the adhesive lifters, attempting to prove that Balshy's testimony was false. The prosecutor even recommended to the deputy executive attorney general that he investigate the feasibility of prosecuting Balshy for perjury. A few days later, *while appellant's trial was still in progress*, the Pennsylvania state police discovered the missing adhesive lifters in their evidence locker at the state police barracks. Despite their significant relation to the facts at issue in the trial, the Commonwealth suppressed the discovery. Then for more than two years, while appellant's case was on direct appeal to this court, the Commonwealth continued to suppress the fact that it had in its possession the disputed exculpatory evidence, vigorously arguing all the while that this court should affirm appellant's death sentence.

Meanwhile, Corporal Balshy was made the scapegoat for the misconduct on the theory that he had fabricated and "planted" the evidence after the autopsy. It was even argued by the Commonwealth at appellant's trial that the defense had paid Balshy to concoct his testimony about the sand and the lifters. Investigations conducted after trial by the state police and by the attorney general's office concluded that there was no evidence of perjury or falsification of evidence by Balshy. Finally, on July 12, 1988, the attorney general's office informed defense counsel that the missing lifters had been discovered, though *even then*, there seemed to be some hesitancy concerning the prosecutor's duty to disclose the evidence.

It is a gross understatement to conclude, as stated by the trial court and Superior Court that "neither the Attorney General's Office nor the Pennsylvania State Police can take any great pride in the manner in which this case was handled during the trial and on appeal. " *Commonwealth v. Smith*, 404 Pa.Super. at 560 n. 3, 591 A.2d at 733 n. 3. Deliberate failure to disclose material exculpatory physical evidence during a capital trial, intentional suppression of the evidence while arguing in favor of the death sentence on direct appeal, and the investigation of Corporal Balshy's role in the production of the evidence rather than its own role in the suppression of evidence constitute prosecutorial misconduct such as

violates all principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause.

Prior to the decision of the United States Supreme Court in *Oregon v. Kennedy*, *supra*, the intentional misconduct of the prosecutor at appellant's trial would unquestionably have resulted in the invocation of the double jeopardy bar against subsequent prosecution. The standard in effect prior to *Oregon v. Kennedy* was:

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. "[The Double Jeopardy Clause] bars retrials where 'bad faith conduct by judge or prosecutor,' threatens the '[h]arassment of an accused by successive prosecutions or declarations of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." *United States v. Dinitz*, 424 U.S. [600], at 611, 47 L.Ed.2d 267, 96 S.Ct. 1075 [1081] (citations omitted).

Id., 456 U.S. at 674, 102 S.Ct. at 2088, 72 L.Ed.2d at 423-24. The same standard was embodied in our caselaw:

> The United States Supreme Court has enunciated principally two types of prosecutorial overreaching. First there is the prosecutorial misconduct which is designed to provoke a mistrial in order to secure a second, perhaps more favorable, opportunity to convict the defendant. Second there is the prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. In contrast to prosecutorial error, overreaching is not an inevitable part of the trial process and cannot be condoned. It signals the breakdown of the integrity of the judicial proceeding, and represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against.

Commonwealth v. Starks, 490 Pa. 336, 341, 416 A.2d 498, 500 (1980) (citations omitted). *Oregon v. Kennedy*, however, under the guise of simplifying and clarifying the principle, restated the test as follows:

> Because of the confusion which these varying statements of the standard in question have occasioned in other courts, we deem it best to acknowledge the confusion and its justifiability in the light of these statements from previous decisions. We do not by this opinion lay down a flat rule that where a defendant in a criminal trial

> successfully moves for a mistrial, he may not thereafter invoke the bar of double jeopardy against a second trial. But we do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

456 U.S. at 679, 102 S.Ct. at 2091, 72 L.Ed.2d at 426-27. This court, recognizing that theretofore the standard under the double jeopardy clause of the Pennsylvania Constitution had been coextensive with the federal Constitution, restated the test in *Commonwealth v. Simons*, *supra*, in terms of the federal standard enunciated in *Oregon v. Kennedy*.

In neither *Oregon v. Kennedy* nor *Commonwealth v. Simons* did the reworded test produce a different result than would have been reached under the prior test. In *Oregon v. Kennedy*, the prosecutor asked a question in such form as to reflect adversely on the character of the defendant, but the inadvertent reference was not calculated to provoke a mistrial nor to prejudice the defendant; he would not have received double jeopardy protection under the prior test or under the restated test. In *Simons*, the defendant made a "doubtful" claim that the prosecutor failed to make full disclosure of a plea agreement with a Commonwealth witness, but the prosecutor's conduct clearly was not intended to provoke a mistrial nor to prejudice the defendant. The *Simons* court specifically stated that

> we are describing anew only the present applicable standard of review and the circumstances which will cause double jeopardy to attach but not changing the right itself.... Double jeopardy, nevertheless, continues to mean what it has always meant; no new rights were created by *Starks* nor are they being subtracted by virtue of this analysis.

Commonwealth v. Simons, 514 Pa. at 16, 522 A.2d at 541. Thus the restatement of the double jeopardy standard did not appear as a diminution of a defendant's constitutional rights, though it was predicted in *Simons* that cases might arise in which the new standard would afford less protection than the prior test. *See Id.* at 20-23, 522 A.2d at 542-44 (Flaherty, J., concurring).

Although it is arguable that the test enunciated by the United States Supreme Court in *Oregon v. Kennedy* would bar appellant's retrial on the theory that the prosecutor's conduct was intended to subvert the protections afforded by the double jeopardy clause, *see* 456 U.S. at 675-

76, 102 S.Ct. at 2088-89, 72 L.Ed.2d at 424, it is possible that some courts would not view the prosecutorial misconduct in this case as rising to the level of subversion of constitutional rights. Regardless of what may be required under the federal standard, however, our view is that the prosecutorial misconduct in this case implicates the double jeopardy clause of the Pennsylvania Constitution.

We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. Because the prosecutor's conduct in this case was intended to prejudice the defendant and thereby deny him a fair trial, appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial.

Order reversed and appellant discharged.

LARSEN, J., did not participate in the consideration or disposition of this case.

McDERMOTT, J., did not participate in the disposition of this case.

K-1

Humberto ALVAREZ-MACHAIN, Plaintiff-Appellee,

v.

UNITED STATES of America; Antonio Garate-Bustamante; Francisco Sosa, Defendants,

and

Hector BERELLEZ; Bill Waters; Pete Gruden; Jack Lawn, Defendants-Appellants.

Humberto ALVAREZ-MACHAIN, Plaintiff-Appellee,

v.

UNITED STATES of America, et al., Defendant-Appellant.

Humberto ALVAREZ-MACHAIN, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant,

and

Francisco Sosa; Antonio Garate-Bustamante,Defendants-Appellees.

Nos. 95-55464, CV93-04072-JGD, 95-55768, 95-56121.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 8, 1996.
Decided Sept. 24, 1996.

Appeal from the United States District Court for the Central District of California John G. Davies, District Judge, Presiding.

Paul Hoffman, ACLU Foundation of Southern California, Los Angeles, California, for the plaintiff-appellee.

Robert M. Loeb, Appellate Staff, Civil Division, Department of Justice, Washington, D.C., for the defendants.

Michael L. Martinez, Holland & Knight, Washington, D.C., for the defendants-appellants.

Gary S. Lincenberg and Thomas V. Reichert, Bird, Marella, Boxer, Wolpert & Matz, Los Angeles, California; Charles S. Leeper and Karl N. Metzner, Spriggs & Hollingsworth, Washington, D.C., for the defendants-appellees.

Before: GOODWIN and SCHROEDER, Circuit Judges, and KING,* District Judge.

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* Honorable Samuel P. King, United States District Judge for the District of Hawaii, sitting by designation.

GOODWIN, Circuit Judge:

In April 1990 the United States Drug Enforcement Agency (DEA) orchestrated the abduction and torture of Dr. Alvarez-Machain, a Mexican doctor, and transported him to the United States for prosecution for the murder of a DEA agent in Mexico. The criminal case ended when the district court granted a judgment of acquittal.

Alvarez-Machain returned to Mexico and filed this civil action against the United States and its agents under 42 U.S.C. § 1983 and other federal statutes. His claims included the violation of constitutional rights as well as ten torts, ranging from torture to false imprisonment. Defendants moved to dismiss the complaint, and the district court granted the motion in part and denied it in part.

The court dismissed the constitutional claims that were based upon activities occurring in Mexico. The court also dismissed a claim brought under the Torture Victim Protection Act (TVPA). The court refused to dismiss the tort claims as barred by the statute of limitations, and denied the motion based upon the defense of qualified immunity asserted by defendants accused of wrongful conduct within the United States. We affirm the district court in its judgment with respect to all claims other than the TVPA claim. The district court held that it could not apply the TVPA to defendant's actions because the TVPA was enacted subsequent to the pertinent events. Because we hold that application of the TVPA to past acts would not have a retroactive effect, we reverse the district court on this ruling.

FACTS

On April 2, 1990, a team of men alleged to be hired by DEA agents working in Mexico, abducted Dr. Alvarez-Machain from his office in Guadalajara. They blindfolded him, transported him to an unknown location, and proceeded to beat him and subject him to electrical shocks. His kidnappers injected him with unknown chemical substances causing nausea and dizziness, denied him food and water, and forced him to lie face down on the floor for a long period of time. His life was repeatedly threatened, as well as the safety of his family. After enduring this torment for several hours, he was delivered into the hands of the DEA in El Paso, Texas.

Defendant Antonio Garate-Bustamante coordinated and led the activities in Mexico, and defendant Francisco Sosa participated in the events. Both were working as the paid agents of the DEA, who undertook to bring Alvarez-Machain to the United States in order to prosecute him for his alleged role in the murder of DEA agent Enrique Camarena.

Once in El Paso, defendant Garate-Bustamante and several DEA agents interrogated AlvarezMachain. The DEA agents threatened

AlvarezMachain during the interrogation, denied him food and adequate medical attention, and at one point forced him to stand naked and be photographed. In El Paso, the DEA processed Alvarez-Machain under an assumed name or names, despite knowing his true identity, frustrating efforts by his family members and the Mexican government to learn about his whereabouts.

On April 10, 1990, Alvarez-Machain was transferred to Los Angeles and arraigned on charges of murder before United States District Judge Edward Rafeedie. Subsequently, Judge Rafeedie dismissed the charges, concluding that the court lacked jurisdiction over Alvarez-Machain because his abduction violated the extradition treaty between the United States and Mexico. *United States v. Caro-Quintero*, 745 F.Supp. 599, 601 (C.D. Cal. 1990), *aff'd sub nom United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991). The Supreme Court reversed the decision, however, and Alvarez-Machain was forced to stand trial. *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S. Ct. 2188, 119 L.Ed.2d 441 (1992). As noted, the prosecution ended with a judgment of acquittal on December 14, 1992. After the acquittal, Judge Rafeedie revealed that the government had withheld potentially exculpatory evidence from the defense, in addition to failing to take him promptly before a magistrate after he reached United States territory under arrest.

In addition to the cases consolidated in this appeal, Alvarez-Machain filed an administrative claim against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2401(b). He added the United States as a defendant in January, 1994, after the six-month waiting period required by statute had expired. Against all defendants he alleged claims for kidnapping; torture; cruel and inhuman and degrading treatment or punishment; prolonged arbitrary detention; assault and battery; false imprisonment; intentional infliction of emotional distress; false arrest; negligent employment of public employees and agents; negligent infliction of emotional distress; and violations of the Fourth, Fifth and Eighth Amendments to the United States Constitution. Against defendants Garate-Bustamante and Sosa, Alvarez-Machain also alleged a claim under the Torture Victim Protection Act (TVPA).[1]

In dismissing the constitutional claims arising out of conduct in Mexico, the district court held that the United States Constitution does not protect Mexican nationals in Mexico from wrongs committed against them by United States government agents engaged in extraterritorial law enforcement. The district court allowed the action to proceed on conduct by DEA agents acting within the United States, however, holding that the

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[1] Codified in the statutory notes to 28 U.S.C. § 1350.

alleged conduct, if proved, clearly violated established constitutional rights. Accordingly, as noted, the DEA agents who participated in the El Paso activities were denied dismissal on qualified immunity grounds, and they have appealed that ruling.

The court denied Defendants Garate-Bustamante's and Sosa's motions for dismissal as to all but the TVPA claim, holding that more discovery was necessary to determine the exact relationship between the Mexican defendants and the United States before a determination could be made as to whether the defense of qualified immunity was available, or whether the United States could be substituted as the defendant on the tort claims based on their conduct in the United States. As for the TVPA, the district court declined to apply it to claims of torture occurring prior to the enactment of the statute, and Alvarez-Machain appeals that ruling.

Finally, with regard to the United States, the district court denied its motion to dismiss the tort claims as barred by the statute of limitations. The court recognized that the statute of limitations raised a potential problem for Alvarez-Machain, but believed more discovery might reveal a basis for equitable tolling of the statute because of the lengthy duration of the plaintiff's incarceration, including his being held incommunicado, and otherwise prevented from timely protecting his civil rights while defending the murder charges against him.

These rulings are the subject of the present interlocutory appeals.[2]

DISCUSSION

I. Statute of Limitations-No. 95-55768

The government argues that Alvarez-Machain's FTCA claims are barred by the statute of limitations because he failed to file an administrative claim until July 1993-three years after his alleged abduction and torture.

The FTCA provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues....

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[2] In no. 95-55768, the United States appeals the order denying its motion to dismiss the Federal Tort Claims Act causes of action. In no. 95-55464, the DEA defendants appeal the order denying their motion to dismiss the constitutional claims for actions taken in the United States. In no. 95-56121, Alvarez-Machain appeals the dismissal of his constitutional claims for actions taken in Mexico, and the dismissal of his claims under the TVPA. Garate-Bustamante and Sosa also appealed the orders pertaining to their motions for dismissal based on qualified immunity and their motions for substitution of the United States as defendant in the tort actions. These appeals were dismissed by this court pursuant to *Johnson v. Jones*, --- U.S ----, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). Nos. 9555467 and 95-55469.

28 U.S.C. § 2401(b). The key question here is the date of accrual for Alvarez-Machain's claims.

Generally a claim accrues when the plaintiff knows, or in the exercise of reasonable diligence should know, of both the injury and its cause. *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984). Here, Alvarez-Machain did not have a sufficient basis to bring his claims of false imprisonment, negligent infliction of emotional distress, and false arrest until after he had successfully challenged the criminal charges facing him. Indeed, had he filed an administrative claim for these torts prior to obtaining his acquittal, the claim should have been dismissed as premature. *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (holding that civil claims which necessarily implicate the validity of criminal charges do not accrue until after one has succeeded in the criminal realm).

Alvarez-Machain's other tort claims do not necessarily implicate the validity of his criminal charges. Nonetheless, this is an appropriate case for the application of the doctrine of equitable tolling of the statute of limitations. In addition to the obvious reasons for its application to claims that could not have been brought prior to his acquittal, reasons of judicial economy counsel against splitting causes of action, and reasons of common decency counsel against using governmental immunity as a sword instead of a shield in this case.

Equitable tolling is available in suits against the United States absent evidence that Congress intended the contrary. *Irwin v. Dept. of Veteran Affairs*, 498 U.S. 89, 95-95,III S.Ct. 453, 112 L.Ed.2d 435 (1990). Nothing in the FTCA indicates that Congress intended for equitable tolling not to apply. Hence, equitable tolling is available for FTCA claims in the appropriate circumstances; and the circumstances of this case are highly appropriate for tolling.

> Federal courts have applied the doctrine of equitable tolling in two generally distinct kinds of situations. In the first, the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant. In the second, extraordinary circumstances beyond plaintiffs' control made it impossible to file the claims on time.

Seattle Audubon Soc. v. Robertson, 931 F.2d 590, 595 (9th Cir. 1991), *rev. on other grounds*, 503 U.S. 429, 112 S.Ct. 1407, 118 L.Ed.2d 73 (1992). *See also Capital Tracing, Inc. v. United States*, 63 F.3d 859 (9th Cir. 1995) (tolling the statute due to a lack of clarity in the law).

Here, the circumstances of Alvarez-Machain's abduction and subsequent trial warrant the equitable tolling of the statute of limitations.

Alvarez-Machain was incarcerated for over two years, facing criminal charges of the highest gravity in a foreign country whose language he did not understand. His life was at stake, and his case involved numerous, complex issues of first impression-several of which were ultimately decided by the United States Supreme Court. *See, e.g., United States v. Alvarez-Machain*, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990). Moreover, as discussed, had he filed an administrative claim prior to obtaining an acquittal, many of his claims would have been dismissed because they necessarily implicated the validity of his criminal charges. *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383. Looking at the totality of these circumstances, we conclude that Alvarez-Machain's case constitutes that rare situation where equitable tolling is demanded by sound legal principles as well as the interests of justice. We affirm the denial of the government's motion based on the statute of limitations.

II. DEA Agents Qualified Immunity

Pre-trial detainees possess a clearly established right to be free from punishment. *Bell v. Wolfish*, 441 U.S. 520, 534-37, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). This right is located in the due process clause of the Fifth Amendment, but we borrow from Eighth Amendment principles in determining the care to be afforded pre-trial detainees. *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986). The Eighth Amendment "proscribes ... sanctions that are 'so totally without penological justification that it results in the gratuitous infliction of suffering.' " *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). Convicted prisoners and pre-trial detainees are also entitled to "adequate food, clothing, shelter, sanitation, medical care, and personal safety." *Id.*

The complaint here reveals that the DEA agent defendants "threatened" Alvarez-Machain during an interrogation session in El Paso on April 3, 1990; withheld food throughout the interrogation; incarcerated him under a false name, making it impossible for the United States government to respond to inquiries about his whereabouts from his family or the Mexican government; and denied him adequate medical attention. Each of these allegations, if proven, served to create an atmosphere of fear and isolation, imposing "gratuitous suffering" in violation of Hoptowit. Further, the deprivation of food and medical attention alone could serve to sustain a claim under the due process clause. *Id.* Accordingly, the district court did not err in denying defendants' motion to dismiss these claims.

III. Extraterritorial Application of the Fifth Amendment

Alvarez-Machain argues that the district court erred in holding that the Fifth Amendment due process clause does not protect aliens from actions taken by the United States abroad. We find it unnecessary to reach this issue. The issue is precluded because, under the instruction of the Supreme Court, in his criminal prosecution, we have already held that the actions taken by United States government agents or their employees against Alvarez-Machain in Mexico did not violate due process. *United States v. Alvarez-Machain*, 971 F.2d 310 (9th Cir. 1992) (on remand from the United States Supreme Court). There we stated, "Alvarez-Machain's main alternative argument is that the circumstances of his kidnapping were so shocking that the abduction constituted a denial of due process. This contention similarly is not supported by the district court's findings." *Id.* at 311. This adverse finding in the criminal action bars Alvarez-Machain from pressing the issue again in the civil arena. *Matthews v. Macanas*, 990 F.2d 467 (9th Cir. 1993).

IV. Torture Victim Protection Act

Alvarez-Machain's complaint also included a claim against defendants Garate-Bustamante and Sosa under the Torture Victim Protection Act, signed into law on March 12, 1992. The law provides in pertinent part: "An individual who, under actual or apparent authority, or color of law, of any foreign nation-(l) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; ...." TVPA § 2(a), codified in the statutory notes to 28 U.S.C. § 1350.

The district court dismissed the TVPA claim, holding that application of the TVPA to the allegations here would have an improper, retroactive effect. Alvarez-Machain argues that application here would not have a retroactive effect because defendants' had a legal duty to refrain from torture even prior to the TVPA's passage. The two other district courts to have considered the issue agreed with the argument advanced by Alvarez-Machain, see *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995); *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189 (S.D.N.Y. 1996), but it appears to be an issue of first impression for the Circuit courts.

The Torture Victim Protection Act is silent with regard to whether Congress intended for it to apply retroactively. Absent clear Congressional intent, there exists a strong presumption against retroactivity. However, not every application of a statute to events occurring before its enactment constitutes a "retroactive application." An application does not have a retroactive effect unless "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994). Courts regularly apply new statutes

to past events when the intervening statute authorizes or affects the propriety of prospective relief; where the intervening statute confers or ousts jurisdiction; or when the intervening statute merely changes the procedural landscape. *Id.* at 1501-1502.

The Torture Victim Protection Act does not impose new duties or liabilities on defendants. Torture has long been condemned and prohibited by international law. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Further, aliens have had the right to adjudicate torture claims in our federal courts since the passage of the Alien Tort Claim Act (ATCA) in 1789.[3]

Defendants attempt to distinguish the ATCA from the TVPA in three ways, but none warrant a holding that application of the TVPA to defendants' conduct would have a retroactive effect.

First, defendants argue that the ATCA confers jurisdiction on federal courts to hear international law claims, but does not create a substantive, federal right like the TVPA. Defendants err in their description of the ATCA; we have previously held that the ATCA has a substantive as well as a jurisdictional component. *In re Estate of Ferdinand Marcos, Human Rights Lit.*, 25 F.3d 1467 (9th Cir 1994) (Marcos II), *cert. denied* --- U.S. ----, 115 S.Ct. 934, 130 L.Ed.2d 879 (1995). *Accord Xuncax*, 886 F.Supp. 162; *Cabiri*, 921 F.Supp. 1189. In *Marcos II* we stated,

> in contrast to section 1331 "which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C.Cir.1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 10039 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985).

Id. at 1475. The court further explained, "International law does not require any particular reaction to violations of law.... Whether and how the United States wished to react to such violations are domestic questions. [Internal quotation marks and citation omitted.]" *Id. See also Filartiga*, 630 F.2d 876 (holding that claims of torture could be adjudicated under the ATCA because torture constituted a violation of international law).

Our conclusion in *Marcos II* is supported by the legislative history of the TVPA.

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[3] The ATCA provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

> The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." ... Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.

H.R. Rep. (Judiciary Committee) No. 367(I), 102nd Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86; *see also* S. Rep. (Judiciary Committee) No. 249, 102nd Cong., 1st Sess. (1991).

Second, defendants argue that the TVPA expands the class of plaintiffs able to bring claims for torture, and thus creates new duties. Where the ATCA allows only aliens to bring actions in U.S. courts for extraterritorial torture, the TVPA allows aliens and citizens to bring such claims. The defendants' distinction is without significance, however, because citizens have always been able to bring claims for extraterritorial torture in state courts under the transitory tort doctrine. The TVPA merely allows citizens now to bring those claims in federal court as well. There is no increase in duties or liabilities, and thus no retroactive effect.

Third, defendants argue that the TVPA increases liabilities by exposing a new class of defendants to personal liability. Under the ATCA, defendants maintain, individuals would not be held personally liable for acts of torture if, while acting under the color of foreign authority, they were also working within the scope of employment for the United States. In such cases, the United States would be substituted as the defendant, and the individuals would escape personal liability. Because no substitution is allowed under the TVPA, defendants claim they are newly burdened with liability they did not have before 1992.

Defendants postulate a set of circumstances that are too remote to affect our retroactivity analysis. If courts were required to give weight to every hypothetical suggestion advanced by litigants, few statutes would survive the Landgraff test.

V. Conclusion

The judgment of the district court is AFFIRMED insofar as it dismissed the constitutional claims arising out of harms suffered by the plaintiff in Mexico; we AFFIRM the denial of the government's defense based on the statute of limitations; and the denials of motions to dismiss on the basis of qualified immunity. We REVERSE the ruling that the TVPA claims were barred because application of the statute to events

taking place prior to its enactment would have a retroactive effect. We REMAND the case to the district court for further proceedings.

The plaintiff is entitled to costs on appeal.

L-1

Val Davis DAY, Appellant,
v.
Eric ZUBEL, Individually and Eric Zubel, Chtd., Respondents.

No. 26579
Supreme Court of Nevada.
Aug. 16, 1996.

Barker, Gillock, Koning & Brown and Janet S. Markley, Las Vegas, for Appellant.
Rawlings, Olson, Cannon, Gomley & Desruisseaux and Peter M. Angulo, Las Vegas, for Respondents.

OPINION

ROSE, Judge.

Val Davis Day filed a complaint for legal malpractice against Eric Zubel when Zubel failed to file civil rights claims on Day's behalf. The district judge granted Zubel's motion for summary judgment on the following grounds: (1) the statute of limitations expired on March 15, 1993, which was before Day met with Zubel; and (2) Day's alleged cause of action contained no viable underlying claims. We conclude the district judge's grant of summary judgment was improper.

FACTS

In September 1982, Day was convicted of and imprisoned for sexual assault. Subsequently, Day's appeal of his conviction was processed first by the state public defender's office and then by the county public defender's office. Pursuant to its decision not to allocate personnel to habeas corpus files until higher priority files were processed, the state public defender's office filed Day's petition for a writ of habeas corpus in district court after waiting for two and one-half years. Consequently, the writ petition was denied as untimely. After the writ petition was denied, the state public defender's office transferred Day's file to the county public defender's office, which subsequently lost the file, thereby delaying action on Day's claim for another one and one-half years. On March 15, 1991, eight and one-half years after Day's conviction, the district court finally granted Day's writ petition for the following reasons: (1) his incarceration was the result of a defective identification, (2) discrepancies existed in the forensic evidence, (3) he was represented by incompetent counsel, and (4) the prosecutor engaged in misconduct. As a result of the grant of Day's writ petition, his conviction was reversed and a new trial was ordered. On March 27, 1991, bail was posted and Day was released from prison. On

May 17, 1991, the district judge ordered that all criminal charges against Day be dismissed.

In April 1993, Day retained Zubel to handle his potential federal civil rights claims against the police department, the prosecutor, and the state and county public defenders' offices arising under 42 U.S.C. §§ 1981 and/or 1983 for his alleged wrongful arrest, conviction, and incarceration. Zubel told Day that he would review his case and that the statute of limitations was rapidly approaching. Day unsuccessfully attempted to contact Zubel on several occasions following their initial meeting. In July 1993, Zubel informed Day that no claim could be filed on his behalf because the statute of limitations had expired on March 15, 1993, prior to their initial meeting.

Day filed a complaint against Zubel alleging a cause of action for legal malpractice. Day alleged that the statute of limitations on his claims did not expire until May 17, 1993, and Zubel's failure to take timely action resulted in a loss of opportunity to realize compensation for his wrongful incarceration.

Zubel filed a motion for summary judgment, asserting that the statute of limitations had expired on March 15, 1993, two years after Day's writ petition was granted and one month before Day contacted Zubel, and therefore no viable claim for legal malpractice existed. Zubel further asserted that even if he had been able to timely file a civil rights complaint on Day's behalf, two potential defendants, the prosecutor and the police department, were immune from prosecution pursuant to state and federal law; and the state and county public defenders' offices, the only other potential defendants, were immune from prosecution because they acted in a traditional role as attorneys and therefore could not have been state actors who violated Day's constitutional rights "under color of state law."

In his opposition to Zubel's motion for summary judgment, Day reiterated the contention that the statute of limitations did not expire until May 17, 1993, which was two years after Day's criminal charges were formally dismissed and several weeks after Day saw Zubel regarding his potential causes of action. Furthermore, while Day conceded that the prosecutor was afforded absolute immunity,[1] he still contended that a viable cause of action pursuant to 42 U.S.C. § 1983 existed against the state and county public defenders' offices because they violated his rights by virtue of their administrative decision to not allocate personnel to

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[1] Day's opposition motion asserted that the police department did not enjoy the same immunity if its investigative irregularities, recognized by the district judge, qualified as actions under "color of state law." However, whether there was a viable claim against the police was not addressed in district court, and Day did not raise the issue on appeal. Therefore, the issue will not be addressed in this opinion.

habeas corpus files. As evidenced in a letter to the county public defender's office, the state public defender's office admitted it was negligent in processing Day's appeal by virtue of the fact that it waited two and one-half years before it reviewed Day's file. The letter specifically described Day's situation as "appalling," and that Day "is likely innocent, but received improper representation at trial ..., on appeal .... and in habeas corpus (this office). "Day alleged that his claim against the county public defender's office would also have been based on administrative neglect.

The district judge granted Zubel's motion for summary judgment, concluding that the statute of limitations commenced on March 15, 1991, when the petition for habeas corpus was granted, and that there were no viable underlying claims to be pursued because the state and county public defenders' conduct constituted traditional lawyer functions not cognizable in a "color of law" argument.

Day filed this timely appeal challenging the district judge's grant of summary judgment.

DISCUSSION

The required elements of a legal malpractice claim are: (1) an attorney-client relationship; (2) a duty owed to the client by the attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake; (3) a breach of that duty; (4) the breach being the proximate cause of the client's damages; and (5) actual loss or damage resulting from the negligence. *Sorenson v. Pavlikowski*, 94 Nev. 440, 443, 581 P.2d 851, 853 (1978). Therefore, to maintain his claim of legal malpractice against Zubel, Day had the burden of showing that he and Zubel had established an attorney-client relationship, that Zubel had a duty to file his claim, that Zubel breached this duty, and that the failure to file his claim was the proximate and actual cause of damages to Day. Zubel's defense against the legal malpractice claim, and the basis of his motion for summary judgment, was that he owed no duty to Day because the statute of limitations on Day's claim expired before Zubel established an attorney-client relationship with Day and further that even if he negligently failed to file Day's claim before the statute of limitations expired, his negligence caused Day no actual loss because Day had no viable claims that could have been pursued.

Summary judgment is only appropriate when, after a review of the record viewed in a light most favorable to the non-moving party, there remain no issues of material fact. *Butler v. Bogdanovich*, 101 Nov. 449, 451, 705 P.2d 662, 663 (1985). "In determining whether summary judgment is proper, the nonmoving party is entitled to have the evidence

and all reasonable inferences accepted as true." *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 292, 774 P.2d 432, 433 (1989).

This court's review of a summary judgment order is de novo. *Tore, Ltd. v. Church*, 105 Nov. 183, 185, 772 P.2d 1281, 1282 (1989). On appeal, this court is "required to determine whether the trial court erred in concluding that an absence of genuine issues of material fact justified its granting of summary judgment." *Bird v. Casa Royale West*, 97 Nev. 67, 68, 624 P.2d 17, 18 (1981).

Statute of limitations issue

Day contends that genuine issues of material fact remain regarding the accrual date of the statute of limitations. The appropriate accrual date for the statute of limitations is a question of law only if the facts are uncontroverted. *Nevada Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1307 (9th Cir. 1992). Here, both parties acknowledge the pertinent dates as true, and there is no conflicting evidence as to when a fact was known or reasonably should have been known, which is usually a question of fact. *Kawai Farms, Inc. v. Longstreet*, 826 P.2d 1322, 1326 (Idaho 1992). Therefore, we conclude that the issue of when the statute of limitations commenced in Day's action is a matter of law to be determined by this court.

The United States Supreme Court has held that statutes of limitations apply to causes of action brought pursuant to 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261 (1985). Wilson was interpreted by the Ninth Circuit to mandate a two year statute of limitations for such actions in Nevada. *Perez v. Seevers*, 869 F.2d 425, 426 (9th Cir.), *cert. denied*, 493 U.S. 860 (1989).

While courts have not directly addressed the issue of whether a cause of action for a civil rights violation pursuant to 42 U.S.C. § 1983 accrues when the aggrieved is released from prison pending a new trial or when the charges against the aggrieved are formally dismissed, the courts have addressed this issue in regard to an aggrieved's cause of action for malicious prosecution. The United States Supreme Court recently reiterated the well recognized rule that the statute of limitations commences upon final termination of the original criminal proceeding in the claimant's favor. *Heck v. Humphrey*, --- U.S. ----, 114 S.Ct. 2364 (1994).

We conclude the aforementioned rule is applicable to the instant case even though the instant case is not a malicious prosecution action. We further conclude the final termination of the criminal proceedings occurred when criminal charges against Day were dismissed with prejudice, which occurred on May 17, 1991, and that the district judge erred in concluding that Day's proceeding terminated on March 15, 1991.

The final termination of the proceedings occurred on May 17 because prior to that date it was impossible for Day to file his claim for wrongful arrest, conviction, and incarceration because he was still subject to retrial and could have been re-convicted on the underlying sexual assault claim. Such a conviction would have eviscerated his civil rights claims.

Viable underlying claim issue

Day also contends that genuine issues of material fact remain regarding the viability of his underlying claims against the state and county public defenders' offices. Day conceded that no viable claim existed against the police department for false arrest or against the prosecutor for misconduct, but he maintained that he still had claims akin to malicious prosecution against the state and county public defenders' offices pursuant to 42 U.S.C. § 1983.

To recover damages under 42 U.S.C. § 1983 in a case like this, Day must satisfy two elements. First, Day "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, --- U. S. at ----, 114 S. Ct. at 2372. This element was satisfied when the district judge dismissed with prejudice all criminal charges pending against Day.

Second, Day must prove that the defendants' representation of him during his unlawful imprisonment violated Day's constitutional rights and that defendants were acting under color of state law. The determination of whether a public defender acts under color of state law depends on the nature and context of the function he is performing. *Georgia v. McCollum*, 505 U.S. 42, 54 (1992). "[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk County v. Dodson*, 454 U.S. 312, 325 (1981). However, "a public defender may act under color of state law while performing certain administrative, and possibly investigative, functions." *McCollum*, 505 U.S. at 54 (citing *Polk*, 454 U.S. at 325); *see also Imbler v. Pachtman*, 424 U.S. 409, 430-31 & n. 33 (1975) (discussing line that separates administrative and investigative functions from those of an advocate); *see, e.g., Branti v. Finkel*, 445 U.S. 507 (1980) (public defender acted "under color of state law" when making hiring and firing decision on behalf of the state).

Zubel does not dispute that the state and county public defenders' offices violated Day's constitutional rights; however, he argues that the state and county public defenders' offices were not acting under color of state law when the violations occurred and therefore no viable cause of action under § 1983 existed. Our analysis is therefore restricted to

determining whether a genuine issue of material fact exists regarding whether the state and county public defenders' offices acted under color of state law when the alleged violations occurred.

In support of his contention that the state and county public defenders' actions were traditional lawyer functions and therefore not conducted under color of state law, Zubel cites *Franklin v. Oregon, State Welfare Division*, 662 F.2d 1337, 1345 (9th Cir. 1981), a Ninth Circuit Court of Appeals' decision that concluded that a delay in filing an appeal was not an action under color of state law. In further support, Zubel states that a public defender's decision not to file a frivolous suit is within the scope of traditional lawyer functions. *See Polk*, 454 U.S. at 312. Zubel argued that Polk is directly on point because the allegation raised in that case--that the public defender injured the appellant while acting pursuant to administrative rules and procedures for handling criminal appeals--is identical to the allegation raised in Day's underlying claim. We conclude that these cases cited by Zubel are not dispositive because in both cases the individual attorney made a unilateral decision either to delay or to not file an appeal on behalf of his/her client after the case had been assigned to the attorney, whereas in the instant case, no attorney was apparently even assigned to the habeas corpus proceedings.

The district judge said that there was "no question in his mind" that the actions of the public defender, and any actions of a prosecutor, were traditional lawyer functions. We disagree. We conclude that a genuine issue of material fact exists regarding whether the state and county public defenders' actions of (1) failing to assign personnel to handle Day's writ petition and (2) losing the writ petition were administrative functions or traditional lawyer functions. Therefore, summary judgment was improperly granted on this issue, and we remand this case to the district court for further proceedings.

CONCLUSION

We conclude, as a matter of law, that the statute of limitations commenced on May 17, 1991, the date the district judge dismissed all criminal charges against Day. We further conclude that genuine issues of material fact remain regarding whether Day had a viable underlying claim against the state and county public defenders' offices. Therefore, the grant of summary judgment is reversed, and this case is remanded to the district court for further proceedings consistent with this opinion.

STEFFEN, C.J., and YOUNG and SHEARING, JJ., concur.

SPRINGER, J., dissenting:

The majority notes the trial judge's comment that there was "no question in his mind" that the actions of the public defender and the

prosecutor were traditional lawyer functions. With reference to the trial judge's opinion, the majority opinion merely states, "We disagree," without stating any reasons for the disagreement. In my opinion the trial judge was right. The attorney was engaging in traditional lawyer functions and should not be held liable; therefore, I dissent.

M-1

David C. WHITE, Plaintiff-Appellant,
v.
Kevin ELDRIDGE and Charles Costigan,
Defendants-Appellees.

NO. 95-1212.
D.C. No. 95-S-641.

United States Court of Appeals, Tenth Circuit.

Nov. 9, 1995.

Before MOORE, BARRETT, and EBEL, Circuit Judges.

ORDER AND JUDGMENT[1]

EBEL, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Appellant David C. White appeals the sua sponte dismissal of his civil rights complaint filed pursuant to 42 U.S.C. 1983.[2] The complaint, filed pro se and in forma pauperis, alleged that Officer Kevin Eldridge and Detective Charles Costigan, both of the Westminster Police Department, violated White's constitutional rights under the Fourteenth Amendment.

White alleged that he was searched by an officer after a traffic stop and arrested because drugs were found in the car. His property was searched and placed in a bag, and he was taken to the Westminster police station. At the police station, Appellee Eldridge found a bag with methamphetamine residue in the White's wallet. White alleges that the wallet had been previously searched by an "R. L. Johnston" and no drugs had been found. He therefore claims that Eldridge "planted fictitious evidence."

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

[2] The district court denied Appellant's motion to proceed in forma pauperis, but we grant it on appeal pursuant to 28 U.S.C. 1915(a).

White further argues that Appellee Costigan, who conducted his custodial interrogation, falsely stated that appellant had admitted to buying drugs from an individual whom Costigan was investigating at that time; the fabricated admission was to be used to secure convictions of both White and the target of the investigation. Finally, White argues that the defendants mishandled plastic bags containing the suspected drugs, thus contaminating evidence which he claims is exculpatory. White sued for monetary damages from each defendant, for Costigan to withdraw the allegedly fictitious statement and for Eldridge to withdraw the allegedly fictitious evidence. The complaint was filed on March 21, 1995; state criminal proceedings stemming from the arrest were scheduled to begin on May 15, 1995.

The district court dismissed the complaint as legally frivolous pursuant to 28 U.S.C. 1915(d). The court found White's complaint to be factually frivolous, *see Neitzke v. Williams*, 490 U.S. 319, 324 (1989); *Denton v. Hernandez*, 504 U.S. 25, 32 (1992). The court also appeared to rely on the doctrine of *Younger* abstention, which provides that a federal court is generally prohibited from interfering with ongoing state criminal proceedings. *Younger v. Harris*, 401 U.S. 37, 45 (1971).

We review a district court's dismissal of a complaint as frivolous under section 1915(d) for abuse of discretion. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

We find that the facts alleged in White's complaint do not "rise to the level of the irrational or the wholly incredible" so as to render them frivolous. *Denton*, 504 U.S. at 33. However improbable it may seem that the defendants acted in the manner charged, "[a]n in forma pauperis complaint may not be dismissed ... simply because the court finds the plaintiff's allegations unlikely." *Id.* Although White's complaint fails to indicate that he can present evidence to support his allegations, "[p]lausible factual allegations are not frivolous under section 1915(d) even if they lack evidentiary support." *Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994). We cannot say that these allegations of police misconduct, specific as they are as to both acts and actors, are so "fantastic or delusional" that the defendants should not be required to answer. *Neitzke v. Williams*, 490 U.S. 319, 328 (1989).

We agree with the district court, however, that this case implicates the Younger abstention doctrine and that White has alleged no "extraordinary circumstance creating a threat of 'irreparable injury' both great and immediate," *Phelps v. Hamilton*, 59 F.3d 1058, 1064 (10th Cir. 1995), such that federal interference with a pending state criminal

prosecution would be appropriate. White's equitable claims were properly dismissed because the relief sought--the withdrawal of the statements and evidence at issue--cannot be granted without disrupting the state criminal proceedings and the claims can be considered in the context of the criminal proceeding itself and subsequently on appeal or collateral proceedings.[3]

As to White's claim for monetary damages, we note that ordinarily, a district court perceiving a Younger concern should stay rather than dismiss a claim for monetary relief that cannot be redressed in the pending state court proceeding. *See Deakins v. Monaghan*, 484 U.S. 193, 202 (1988). However, the injury for which White seeks damages appears to be his imprisonment and trial. If White is convicted in state court, no action will lie under section 1983 to recover for damages "caused by actions whose unlawfulness would render a conviction or sentence invalid" unless the conviction is successfully challenged via some other means. *Heck v. Humphrey*, 114 S.Ct. 2364, 2372--73 and n. 7 (1994). We therefore find that, in light of this uncertainty, dismissal of the damages claim was appropriate.

Finally, we note that the district court did not specify whether the complaint was dismissed with or without prejudice. Generally, an involuntary dismissal for reasons other than jurisdiction, venue or joinder operates as an adjudication on the merits. Fed.R.Civ.P. 41(b). However, the Supreme Court has observed that "a 1915(d) dismissal is not a dismissal on the merits" *Denton v. Hernandez*, 504 U.S. 25, 34 (1992). Similarly, "it is not appropriate to address the merits in a case to which Younger applies." *Greening v. Moran*, 953 F.2d 301, 304 (7th Cir.), *cert. denied*, 113 S.Ct. 77 (1992). We have expressed our preference that petitions filed pro se and in forma pauperis be dismissed without prejudice. *See Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990). In light of this preference, and absent any apparent intention by the district court that the dismissal be with prejudice, we assume that the dismissal below was without prejudice. Thus, depending on the outcome of White's state proceedings, petitioner may, upon their conclusion, be able to recommence his damages action in forma pauperis.

Accordingly, we AFFIRM the order of the district court dismissing appellant's claim. The mandate shall issue forthwith.

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[3] The status of the state court proceeding is unclear from the record on appeal. For the reasons stated, however, the current status is irrelevant to our disposition of this issue.

N-1

Robert Lee MILLER, Jr., Plaintiff-Appellant,
v.
Larry JONES and Ray C. Elliott, Defendants-Appellees.

No. 96-6077.

United States Court of Appeals, Tenth Circuit.

July 29, 1996.

Before TACHA, BALDOCK, and BRISCOE, Circuit Judges.

ORDER AND JUDGMENT*

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Robert Lee Miller, Jr., appearing pro se, filed this 42 U.S.C. § 1983 action, alleging he was being unconstitutionally confined in the Oklahoma County jail. Miller appeals the district court dismissal of the action. We affirm.

Miller was convicted of two counts of first degree murder, two counts of first degree rape, two counts of first degree burglary, and one count of attempted first degree burglary in May 1988, and was sentenced to two death sentences and cumulative prison sentences of 725 years. On February 24, 1995, the Oklahoma Court of Criminal Appeals granted a joint application filed by the prosecution and the defense to reverse the convictions based upon newly discovered evidence obtained through DNA testing, and the case was remanded to the state district court for new trial.

While awaiting the new trial, Miller filed this action, naming as defendants the District Court of Oklahoma County, the State of Oklahoma, the Assistant District Attorney for Oklahoma County, and a Special District Judge for Oklahoma County. Miller alleged his right to speedy trial and his due process rights had been violated and stated he "would like to have the case dismissed against [him], and to be granted [his] freedom once again, also any other remedies [he] might be entitled to under the

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

law." R I Doc. 2 at 5. Defendants moved to dismiss and the magistrate judge issued written findings and recommended dismissal. The magistrate noted that a petition for writ of habeas corpus, rather than a § 1983 action, was the appropriate method for seeking relief from illegal confinement, and that Miller must first exhaust his state court remedies before seeking habeas relief in federal court. The magistrate further found Miller would not be entitled to any monetary relief until such time as it was determined he had been unconstitutionally confined. The magistrate also found the defendant assistant district attorney was entitled to prosecutorial immunity from § 1983 claims and the defendant special judge was entitled to absolute immunity from such claims. The district court adopted the magistrate's findings and dismissed the action.

Having reviewed the entire record, we fully agree with the findings of the district court. To the extent Miller challenged the constitutionality of his confinement, he must exhaust his state court remedies and then pursue relief in a petition for writ of habeas corpus. *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). Insofar as the suit seeks recovery of monetary damages against the named defendants, it is properly characterized as a § 1983 suit. However, in *Heck v. Humphrey*, 114 S.Ct. 2364, 2372 (1994), the Supreme Court held that in order to recover damages for allegedly unconstitutional conviction or imprisonment, a § 1983 plaintiff must prove the conviction or imprisonment had been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. Because Miller has failed to make any of these showings, his claim for monetary damages must be dismissed. Finally, both of the individual defendants named are immune from suit under § 1983. *See Mireles v. Waco*, 502 U.S. 9, 11-12 (1991) (state district judges are absolutely immune from liability in civil rights suits seeking monetary damages for actions taken in their judicial capacities); *DiCesare v. Stuart*, 12 F.3d 973, 977 (10th Cir. 1993) (prosecutor enjoys absolute immunity for actions taken during judicial proceedings).

AFFIRMED. The mandate shall issue forthwith.

O-1

Diana O. MURPHY, Plaintiff,

v.

Detective Clyde SIMPSON, NYPD, Sergeant Cynthia Smith, NYPD, Detective Edward Ortiz, NYPD, Detective Millie Doe, Douglas Nadjari, Charles Hynes, County of Kings, City of New York, and State of New York, Defendants.

No. 94 CV 5610.
United States District Court,
E. D. New York.
June 1, 1995.

Diana O. Murphy, Brooklyn, NY, plaintiff pro se.
Paul A. Crotty, Corp. Counsel of City of New York, (David Lock, of counsel), New York City Law Dept., New York City, for city defendants.
Dennis C. Vacco, Atty. Gen. of State of New York (Mark G. Peters, of counsel), New York City, for defendant State of N. Y.

MEMORANDUM AND ORDER

NICKERSON, District Judge:

Plaintiff brought this action pro se under 42 U.S.C. §§ 1983, 1985, and 1988 against several New York City police officers, the city, members of the Kings County District Attorney's Office, the county, and the state, alleging false arrest, illegal search and seizure, assault, unlawful imprisonment, malicious prosecution, and a conspiracy to violate her civil rights, in violation of the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and of state law.

Plaintiff originally filed her complaint in the United States District Court for the Southern District of New York. By Order dated November 27, 1994 the Honorable Leonard B. Sand transferred this action to the Eastern District of New York.

By letter dated March 27, 1995 plaintiff withdrew her complaint against the State of New York.

The remaining defendants move to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim or, in the alternative, to stay the action pending the disposition of related criminal proceedings against plaintiff. Plaintiff cross-moves for judgment on the pleadings.

I

Plaintiff's complaint alleges, in substance, the following.

On the morning of August 23, 1994 plaintiff, who describes herself as a consultant, "educator of the law" and public speaker, was

leaving her home with a visitor. Sergeant Smith and Detective Ortiz, who, along with two unidentified officers, had been "stalking" plaintiff for approximately four months, jumped out of an unmarked car. They ran toward plaintiff, grabbed her, forcibly placed her in chains, seized her personal property, and forced her into the backseat of an unmarked car.

When plaintiff's husband tried to "protect Plaintiff from being kidnapped, " the officers threatened to chain and "kidnap" him also if he followed them in his car. When he asked to see a warrant, Sergeant Smith threatened to jail plaintiff's husband in Albany.

The two unidentified officers watched from another unmarked car. None of the officers identified themselves as police or showed plaintiff their badges. They did not have an arrest or search warrant for plaintiff or her property.

Plaintiff was not engaged in any illegal activity "immediately prior to" the officers' arrival, nor was there any "riot, insurrection, invasion, or breach of peace" occurring on her property.

The officers "kidnapped" plaintiff and took her to jail, where she was held for approximately 28 hours.

They gave plaintiff's property, either directly or indirectly, to Assistant District Attorney Nadjari. Nadjari told plaintiff that she was arrested because he "thinks" she committed a crime he was investigating. Detective Simpson used trickery to cause plaintiff's arrest, by attending plaintiff's seminars under a false name.

Plaintiff was not given a probable cause hearing before a neutral judge.

When plaintiff was released, Nadjari threatened to jail her again if she "were to assemble and advise americans to petition the government for a redress of grievances."

Plaintiff's personal property still has not been returned to her. Nadjari and "other intruders" have used phone numbers from plaintiff's address book and pager to harass her friends.

Defendants' actions were malicious, intentional, without a warrant, planned more than two weeks in advance, and were taken at the direction of Nadjari.

As a result of defendants' conduct, plaintiff has suffered severe emotional distress, loss of personal property, and injury to her ability to earn a living. She seeks declaratory and injunctive relief, and damages of more than 250 million dollars.

Defendants inform the court that plaintiff subsequent was indicted on charges of Scheme to Defraud in the first degree, Conspiracy in the fifth degree, and Criminal Contempt in the second degree. *See* Declaration of David Lock in Support of Motion to Dismiss, Exh. A. The

indictment alleges, in substance, that plaintiff held seminars, at which she fraudulently induced those in attendance to pay her money by promising them such payments entitled them to join various class action lawsuits from which they would win large awards. Plaintiff currently is awaiting trial on these charges in the Supreme Court of the State of New York, Kings County.

II

Plaintiff moves for judgment on the pleadings. She says defendants' failure specifically to admit or deny each allegation contained in her complaint requires the court to deem such allegations admitted.

But defendants have elected to file a motion to dismiss before filing an answer to the complaint. *See* Fed. R. Civ. Pro. 12(a) (service of a motion to dismiss extends the time limit for serving a responsive pleading to 10 days after notice of the court's denial of such motion), and (b) (a motion to dismiss the complaint "shall be made before pleading").

Thus plaintiff's motion for judgment on the pleadings is premature. *See* Fed. R. Civ. Pro. 12(c) (a party may move for judgment on the pleadings "[a]fter the pleadings are closed").

III

The court will grant a 12(b)(6) motion to dismiss only if there is no set of facts under which the plaintiff could prevail. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957); *Madonna v. United States*, 878 F.2d 62, 65 (2d Cir. 1989). For the purposes of such a motion, the court assumes the facts as stated in the complaint to be true, *see Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991); *Madonna* at 65, and construes plaintiff's pro se pleadings especially liberally, *see Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972).

Defendants say the court should abstain from exercising jurisdiction in deference to the ongoing state criminal proceedings. *See Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971); *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764 (1971).

A federal court should abstain from exercising jurisdiction over claims for injunctive and declaratory relief only if (1) there is an ongoing state proceeding; (2) an important state interest is implicated; and (3) the plaintiff has an avenue open for review of constitutional claims in the state proceedings. *See Cecos International, Inc. v. Jorling*, 895 F.2d 66, 70 (2d Cir. 1990); *Levy v. Lerner*, 853 F. Supp. 636, 641 (E.D.N.Y. 1994).

Here, all three requirements are satisfied. Plaintiff currently is the subject of an ongoing state criminal prosecution. Moreover, a state has a compelling interest in adjudicating its criminal cases. Finally, a defendant can raise constitutional claims before the state courts either during the criminal trial or on direct appeal.

A federal court nevertheless should not abstain if a plaintiff can show (1) that the prosecution is based on a flagrantly and patently unconstitutional statute, *Younger*, 401 U.S. at 53-54, 91 S.Ct. at 755; (2) that the prosecution is brought in bad faith as part of a pattern of harassment, *id.*, 401 U.S. at 49, 91 S. Ct. at 753; or (3) "other unusual situations," such as a biased forum, which pose a threat of great, immediate, and irreparable harm, *id.*

Plaintiff does not challenge the constitutionality of any state statute. Moreover, even construing her pro se pleadings especially liberally, *see Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594 (1972), the court concludes that her allegations of bad faith are insufficient to warrant an exception to abstention.

Although her complaint alleges generally that defendants acted "in bad faith" and "with the intent of injuring and oppressing" her, none of her specific allegations tends to suggest that she was the subject of harassment or that the prosecution was undertaken "in bad faith without hope of obtaining a valid conviction." *Perez v. Ledesma*, 401 U.S. 82, 85, 91 S.Ct. 674, 677 (1971).

Plaintiff says that the police planned her arrest for at least two weeks, that they were "stalking" her, and that Detective Simpson attended her seminars under a false name. But such allegations are at least as indicative of a standard police investigation employing undercover surveillance techniques as they are of a pattern of harassment. *Cf. Carr v. Axelrod*, 798 F. Supp. 168, 175-176 (S.D.N.Y. 1992) ("One prosecution does not harassment make").

Nor has plaintiff established the existence of any other circumstances that pose a threat of great, immediate and irreparable harm. The court concludes that none of the exceptions outlined in Younger apply to plaintiff's claims for declaratory and injunctive relief and, thus, they should be dismissed.

But because plaintiff also seeks monetary damages, the court determines that it "should stay rather than dismiss the federal action for damages." *Feerick v. Sudolnik*, 816 F. Supp. 879, 883 (S.D.N.Y. 1993) (citing *Deakins v. Monaghan*, 484 U.S. 193, 202, 108 S.Ct. 523, 529 (1988)).

IV

Defendants' motion to dismiss is granted in part and denied in part. Plaintiff's application for injunctive and declaratory relief is denied. Plaintiff's claims for monetary damages are stayed pending disposition of the state criminal proceedings.

So ordered.

P-1

David Lee DANIEL, Plaintiff,

v.

Contra Costa County Sheriff Warren P. RUPH, et al., Defendants.

No. C-94-3317 EFL

United States District Court,

N.D. California

Oct. 12, 1994

ORDER

LYNCH, District Judge.

Plaintiff David L. Daniel, a pretrial detainee representing himself in propria persona in his ongoing state criminal proceedings, brings this civil rights action pro se pursuant to 42 U.S.C. § 1983. Plaintiff claims that he has been denied full use of the law library and a legal runner and that the law clerk provided him is ineffective. According to plaintiff, he is unable to determine what materials he needs from the indexes with which he is provided and that the cases he receives are incomplete because he is told they are too long to copy in full. Thus, plaintiff asserts that he is unable to adequately defend himself in the state proceedings against him. Plaintiff also seeks to proceed in forma pauperis.[1]

DISCUSSION

Plaintiff has essentially asserted a Sixth Amendment claim under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1977) (holding that a criminal defendant has a constitutional right under the Sixth Amendment to conduct his own defense) and seeks two forms of relief. First, he seeks injunctive relief from this Court to compel the state to provide him with a meaningful opportunity to prepare his defense. Second, plaintiff also seeks damages from the defendants pursuant to 42 U.S.C. § 1983 for having been denied meaningful access to legal materials to prepare his defense.

I

The court first considers plaintiff's claim for injunctive relief. A federal court cannot interfere with ongoing state criminal proceedings by granting injunctive relief or declaratory relief absent a showing of the state's bad faith or harassment, or a showing that the statute challenged is "flagrantly and patently violative of express constitutional prohibitions." *Younger v. Harris*, 401 U.S. 37, 46, 53-54 (1971); *Samuels v. Mackell*, 401 U.S. 66 (1971). Absent such circumstances, a district court may not retain

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[1] Venue is proper in this district as the defendants reside, and a substantial part of the events giving rise to the action occurred, in this district 28 U.S.C. § 1391(b).

jurisdiction and must dismiss the action. *Judice v. Vail*, 430 U.S. 327, 328 (1977); *see also Beltran v. California*, 871 F.2d 777, 782 (9th Cir. 1988) (*Younger* abstention requires dismissal of the federal action).

The facts alleged fall short of the extraordinary circumstances envisioned by *Younger* to compel this Court to interfere with pending state criminal proceedings. Plaintiff asserts that he has been inconvenienced in preparing his defense because the legal materials he is provided are incomplete and he has been denied the use of a legal runner. In *Younger*, the Supreme Court found that the cost, anxiety, and inconvenience of preparing a criminal defense are not the kind of special circumstances or irreparable harm that would justify federal court intervention.[2] *Younger*, 401 U.S. at 46. Accordingly, plaintiff's claim for injunctive relief is DISMISSED without prejudice.

II

Next, the Court considers plaintiff's claim for damages. In *Heck v. Humphrey*, 114 S.Ct. 2364, 2372 (1994) the Supreme Court held that § 1983 damage actions that necessarily require the plaintiff to prove the unlawfulness of the plaintiff's conviction or confinement are not cognizable under § 1983 and must be dismissed. According, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of the plaintiff's criminal proceedings and any resulting conviction or sentence. *Id.* If it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. *Id.*

In this case, plaintiff seeks damages under § 1983 based on a violation of his Sixth Amendment right to put on a meaningful defense. A judgment in favor of the plaintiff on that claim would imply the invalidity of his ongoing criminal proceedings. If plaintiff were successful in showing that he had been denied his constitutional right to prepare his defense, any conviction which flowed from that denial would be invalidated. Therefore, the instant allegations fail to state a cognizable claim under § 1983 and are DISMISSED without prejudice.[3]

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[2] To the extent that plaintiff seeks to challenge the validity of his ongoing criminal proceedings due to denial of his right to self-representation under Faretta, his remedy is to file a petition for writ of habeas corpus after he has first exhausted his state remedies. *See Carden v. Montana*, 626 F.2d 82, 83 (9th Cir.), *cert. denied*, 449 U.S. 1014 (1980).

[3] If plaintiff wishes to pursue a § 1983 damages action in the future, he must first wait until his conviction or sentence is reversed, expunged, invalidated or impugned by the grant of a writ of habeas corpus. *Heck*, 114 S.Ct. at 2374. Plaintiff may file a writ of habeas corpus under 28 U.S.C. § 2254(a) when his state judicial remedies have been exhausted. 28 U.S.C.

CONCLUSION

For the foregoing reasons, plaintiff's requests for injunctive relief and damages under 42 U.S.C. § 1983 are DISMISSED without prejudice. Plaintiff's request to proceed in forma pauperis is DENIED.

The Clerk shall close the file.

IT IS SO ORDERED.

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§ 2254(b, c). He may then challenge the fact, duration or execution of his state sentence as being violative of the Constitution or laws or treaties of the United States.